SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1958
No. 326

In the Matter of Disciplinary Proceedings against HARRIET BOUSLOG SAWYER, a Member of the Territorial Bar of the Territory of Hawaii,

Petitioner.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF PETITIONER.

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SUBJECT INDEX

PAGE

Opinions below 1

Jurisdictional grounds 1

Questions presented 2

Provisions of Constitution, statutes, regulations involved 4

Statement of the case 6

The judgment and its effect 6

The proceedings in the Territorial Court 6

The evidence and the findings—the Honokaa speech 7

The evidence and the findings—the interviews of the juror Fuller 16

The genesis of the charges 17

Petitioner's professional record 18

Summary of argument 23

Point One. The findings of the Territorial Court, affirmed below, that petitioner's Honokaa speech was a "wilful oral attack upon the administration of justice . . . in the . . . District Court" and "by direct statement and implication impugned the judge" are so arbitrary as to offend due process 30

Point Two. The decision below is a grave infringement upon freedom of speech in an area of great public concern and by a speaker peculiarly fitted to contribute to public understanding 50

Point Three. In holding that petitioner's post-verdict interview of the juror, Fuller, was gross misconduct the court below established and applied a principle that undermines the ability of the bar to protect clients and courts from tainted judgments 64

PAGE

Point Four. The judgment of the Territorial Court, affirmed below, was beyond its jurisdiction 69

Conclusion 76

Appendix 77

Pertinent portions of Rule 19, Rules of the Supreme Court of the Territory of Hawaii, as amended, October 31, 1953 .. 77

Pertinent portions of Rule 19, Rules of the Supreme Court of the Territory of Hawaii, as amended, April 21, 1954 80

Rule 15(d), Rules of the Supreme Court of the Territory of Hawaii (effective October 3, 1955) 84

Pertinent portions of Rule 1, Rules of Civil Procedure for the United States District Court for the District of Hawaii (as amended and effective March 21, 1955) 85

TABLE OF AUTHORITIES CITED

CASES	PAGE
Ades, In re, 6 Fed. Supp. 467	61
Alesna v. Rice, 69 Fed. Supp. 987, dism. 75 Fed. Supp. 865, aff'd 172 F. 2d 176, cert. den. 338 U. S. 814	20, 74
Bar Association v. Philbrook, 35 Cal. App. 460, 170 Pac. 440	47
Baumgartner v. United States, 322 U. S. 665	44
Bevans, In re, 225 App. Div. 427, 233 N. Y. Supp. 439	47
Board of Education v. Barnett, 319 U. S. 624	73
Bradley v. Fisher, 13 Wall. 335	44, 45
Breen, In re, 30 Nev. 164, 93 Pac. 997	45, 61
Bridges v. California, 314 U. S. 252	2, 25, 43, 50, 51, 54, 57, 58, 60, 61, 70
California Packing Corporation v. I. L. W. U., Eq. No. 4730	21
Cammer v. United States, 350 U. S. 399	54
Canon 35, In re Hearings on, 296 P. 2d 465	63
Cantwell v. Connecticut, 310 U. S. 296	58
Chicago Bar Assn. v. Metzgen, 291 Ill. 55, 125 N. E. 734	45
Chopak, In re, 66 Fed. Supp. 265	46
Clark v. United States, 289 U. S. 1	66
Cobb v. United States, 172 Fed. 641	47
Collins, In re, 147 Cal. 8, 81 Pac. 220	45
Communist Party v. SACB, 351 U. S. 115	16, 36, 51
Craig v. Harney, 331 U. S. 367	25, 43, 50, 54, 58, 60, 61, 70
Duke v. Committee on Grievances, 82 F. 2d 890	46
Dunn, In re, 85 Nebr. 606, 124 N. W. 120	46
Egan, In re, 24 S. D. 301, 123 N. W. 478	47
Elliott v. Green, 7 Colo. 237, 3 Pac. 65	45
Federation of Labor v. McAdory, 325 U. S. 450	57
Fiske v. Kansas, 274 U. S. 380	44
Flynn v. United States, 130 Fed. Supp. 413	36

PAGE

Fujimoto v. United States, 199 F. 2d 27 22

Fujimoto v. United States, 251 Fed. 342 ..... 6, 7, 16, 17, 34, 37, 40 41, 51, 56, 62, 64, 68, 73

Gallagher v. Municipal Court, 31 Cal. 2d 784, 192 P. 2d 905 .. 49, 54

Graves, In re, 64 Cal. App. 176, 221 Pac. 411 46

Hall v. California Packing Corporation, Civ. No. 802 (Haw.) 21

Hall v. Willson C. Moore, Civ. No. 803 (Haw.) 21

Hall et al. v. Hawaiian Pineapple Company, Ltd., Civ. No. 801, (Haw.), 72 Fed Supp. 533 21

Hartzel v. United Sttaes, 322 U. S. 680 44

Hawaiian Canneries, Ltd. v. I. L. W. U., Eq. No. 112 21

Hawaiian Fruit Packers v. I. L. W. U., Eq. No. 123 21

Hawaiian Pineapple Co., Ltd. v. I. L. W. U., Eq. No. 332 21

Hawaiian Pineapple Co., Ltd. v. I. L. W. U., Eq. No. 4729 21

Herndon v. Lowry, 301 U. S. 242 58

Hilton, In re, 48 Utah 172, 158 Pac. 691 45

Humphrey, In re, 174 Cal. 290, 163 Pac. 60 45

Hyde v. United States, 225 U. S. 347 ..... 66, 67

I. L. W. U. v. Wirtz, 37 Haw. 404, aff'd 170 F. 2d 783, cert. den. 336 U. S. 919, rehear. den. 336 U. S. 971 20

International Longshoremen's and Warehousemen's Union v. Ackerman, 82 Fed. Supp. 65, 187 F. 2d 860, cert. den. 342 U. S. 859 ..... 19, 20, 74

Isserman, In re, 9 N. J. 269, 87 A. 2d 903 ..... 29, 75

Jencks v. United States, 353 U. S. 657 ..... 36, 51

Johnson v. State, 152 Ala. 93, 44 So. 671 45

Jorgensen v. York Ice Machinery Corp., 160 F. 2d 432 66

Kentucky State Bar Assn. v. Lewis, 282 S. W. 2d 321 48

Knauer v. United States, 328 U. S. 654 43

Knight, Matter of, 264 App. Div. 106, 34 N. Y. S. 2d 810 48

PAGE

Konigsberg v. State Bar, 353 U. S. 252 ..... 42, 43, 54, 63
Krulewitch v. United States, 336 U. S. 440 ..... 35, 59
Lewis County Bar Association v. Willis, 95 Wash. 251, 163 Pac. 737 47
Maggio v. Zeitz, 333 U. S. 56 42
Mains, In re, 121 Mich. 603, 80 N. W. 714 48
Mattox v. United States, 146 U. S. 140 66
McDonald v. Pless, 238 U. S. 264 ..... 66, 67
McNab v. United States, 318 U. S. 332 65
Mesarosh v. United States, 352 U. S. 1 ..... 36, 51
Milk Wagon Drivers v. Meadowmoor Dairies, Inc., 312 U. S. 293 43
Morrisette v. United States, 342 U. S. 246 42
Morrison v. Snow, 26 Utah 247, 72 Pac. 924 46
Mortensen v. United States, 322 U. S. 369 42
Norris v. Alabama, 294 U. S. 587 43
Northern Pacific Railway v. Mely, 219 F. 2d 199 ..... 65, 67, 69
Offutt v. United States, 348 U. S. 11 ..... 49, 54, 63
Palakiko v. Harper, 39 Haw. 141, 39 Haw. 16, aff'd 209 F. 2d 75; cert. den. 347 U. S. 956, rehear. den. 347 U. S. 979 ..... 9, 22, 23, 34, 37, 38, 39
Pennekamp v. Florida, 328 U. S. 331 ..... 2, 25, 43, 50, 51, 54, 60, 61, 70
Pennsylvania v. Nelson, 350 U. S. 497 74
People v. Green, 9 Colo. 506, 13 Pac. 514 48
Philbrook, In re, 105 Cal. 471, 38 Pac. 884 48
Rakes v. United States, 169 F. 2d 739 ..... 65, 67, 69
Reinecke v. Loper, 77 Fed. Supp. 333 21
Rescue Army v. Municipal Court, 331 U. S. 549 57
Robinson, In re, 48 Wash. 153, 92 Pac. 929 48
Rogers, In re, 28 N. M. 375, 212 Pac. 1034 48

	PAGE
Sacher v. United States, 343 U. S. 1	75
Schenk v. United States, 249 U. S. 47	56
Schneiderman v. United States, 320 U. S. 118	43, 44
Schware v. Board of Bar Examiners, 353 U. S. 232	42, 43
Secombe, Ex parte, 19 How. 9	44
Slochower v. Board of Education, 350 U. S. 551	42
Snow, In re, 27 Utah 265, 75 Pac. 741	46
State v. Breckenridge, 126 Okla. 86, 258 Pac. 744	45
State v. Kirby, 36 S. D. 188, 154 N. W. 284	46
State Bar Commission v. Sullivan, 35 Okla. 745, 131 Pac. 703	46
State Board v. Hart, 104 Minn. 88, 116 N. W. 212	45
State Board v. Spriggs, 61 Wyo. 70, 155 P. 2d 285	47
Terminiello v. Chicago, 337 U. S. 1	58
Thatcher, In re, 80 Ohio 492, 89 N. E. 39	47
Thatcher v. United States, 212 Fed. 801	47
Thomas v. Collins, 323 U. S. 516	58, 62
Trask, In re, 30 Haw. 736	43
Troy, In re, 43 R. I. 279, 111 Atl. 723	47
United States v. Abe, 95 Fed. Supp. 991	21
United States v. Bridges, 133 Fed. Supp. 638	43, 44
United States v. C. I. O., 335 U. S. 106	57
United States v. Falcone, 109 F. 2d 579	35
United States v. Fujimoto, 105 Fed. Supp. 727	19, 20, 22, 74
United States v. Green, 85 Fed. 857	47
United States v. Markewich, 261 Fed. 537	48
United States v. Reid, 53 U. S. 361	66
Waialua Agricultural Company v. Christian, 305 U. S. 91	75
Wall, Ex parte, 107 U. S. 265	45
Wieman v. Updegraf, 344 U. S. 183	42
Wilhelm's case, 269 Pa. 416, 112 Atl. 561	45
Yates v. United States, 354 U. S. 298	40

RULES

PAGE

Rules of Civil Procedure for the United States District Court for the District of Hawaii, Rule 1 5

Rules of the Supreme Court of the Territory of Hawaii, Rule 1(d) 71

Rules of the Supreme Court of the Territory of Hawaii, Rule 15(d) 2, 5

Rules of the Supreme Court of the Territory of Hawaii, Rule 19 ..... 5, 74

STATUTES

Norris-LaGuardia Act (29 U. S. C. A. 101 ff.) 20

Revised Laws of Hawaii, Acts 10, 62 20

Revised Laws of Hawaii (1945), Sec. 9701 5

Revised Laws of Hawaii (1945), Sec. 11120 ff 20

Revised Laws of Hawaii (1945), Sec. 11570 ff 20

United States Code, Title 18, Sec. 2385 6

United States Code, Title 28, Sec. 1252(1) 2

United States Code, Title 28, Sec. 1293 ..... 2, 4

United States Code, Title 28, Sec. 2108 ..... 2, 4

United States Code Annotated, Constitution, pp. 46, 47 4

United States Constitution, First Amendmnt 4, 26, 44, 58, 60, 61

United States Constitution, Fifth Amendment 4

MISCELLANEOUS

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PAGE

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Wigmore, Evidence (3d Ed.), Sec. 2353 66

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Petitioner.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF PETITIONER.

Opinions Below.

The opinion of the court below is officially reported at 260 F. 2d 189. A copy is set out at R. 548 (majority), R. 584 ff (concurring), R. 588 ff (dissent).

The opinion of the Supreme Court of the Territory of Hawaii (herein called the Territorial Court) is officially reported at 41 Haw. 403. A copy is set out at R. 93 ff.

Jurisdictional Grounds.

The judgment of the Court of Appeals was entered June 9, 1958. The petition for writ of certiorari was filed August 27, 1958. The petition was granted November 17, 1958. The printed record was received by petitioner's counsel January 5, 1959. With the consent of

all counsel the time for filing this brief was extended to and including February 16, 1959.

Jurisdiction of this Court is invoked under 28 U. S. C. 1252(1).[1]

Questions Presented.

1. Whether a lawyer may be disciplined in a manner tantamount to disbarment[2] because of having made public comment concerning a pending case in which he is one of counsel of record

(a) merely because he is counsel of record in the pending case and therefore "under restraints not applicable to the public in general";

(b) without reference to, indeed in rejecting, the clear and present danger rule (see *Bridges v. California*, 314 U. S. 252, 273; *Pennekamp v. Florida*, 328 U. S. 331, 347);

(c) notwithstanding that the comment falls short of utterances which (i) endanger the fair administration of justice or (ii) fail to maintain the respect due the courts as the usual course of decision has defined that term;

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[1]Jurisdiction of the court below was invoked under 28 U. S. C. 1293 on grounds that the case was one "involving the Constitution . . . . of the United States" and wherein the "value in controversy exceeds $5000.00." Petitioner's affidavit as to jurisdictional amount under 28 U. S. C. 2108 [R. 622] was uncontroverted.

[2]The judgment of the Territorial Court is tantamount to disbarment. For under Rule 15(d) of the Rules of the Territorial Court (App. p. 84) an attorney suspended for more than six months must again, "as though applying for admission to the Bar," satisfy that court both as to good moral character and requisite legal learning.

(d) upon evidence that lacks solid and convincing proof of offending conduct and supports reasonable inferences consistent with innocence.

2. Whether the findings of the Territorial Court, approved by the court below, to the effect that petitioner "engaged and participated in a wilful and oral attack upon the administration of justice in and by the said United States District Court . . . and by direct statement and implication impugned the integrity of the judge presiding therein" rest upon such dogmatic inferences as to be wholly unwarranted and are so arbitrary as to offend due process.

3. Whether in the federal courts it is a disciplinary offense for a lawyer, after verdict, to interview trial jurors concerning matters occurring in their deliberations where the lawyer is investigating remarks of the juror concerning wrongdoing and frameup in connection with the trial and verdict.

4. Whether the judgment of the Territorial Court affirmed by the court below, was beyond the jurisdiction of the former and contrary to sound policy governing relations between territorial courts and federal courts in that it purports to set standards of conduct for an attorney with respect to conduct in a federal court and concerning matters pending therein and inevitably affects the right of that attorney to practice before the federal court.

5. Whether by virtue of the arbitrariness of the findings of the court below and the intrusions upon freedom of expression sanctioned and declared by the court below, there have been fashioned standards of professional conduct that menace the independence of the bar in general and the bar of the federal courts in particular.

Provisions of Constitution, Statutes, Regulations Involved.

The United States Constitution, First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (U. S. C. A., Constitution, p. 46.)

United States Constitution, Fifth Amendment:

"No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ." (U. S. C. A., Constitution, p. 47.)

28 U. S. C., Section 1293:

"The courts of appeal for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions of the supreme courts of Puerto Rico and Hawaii, respectively, in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs."

28 U. S. C., Section 2108:

"Where the power of any court of appeals to review a case depends upon the amount of value in controversy, such amount or value, if not otherwise satisfactorily disclosed upon the record, may be shown and ascertained by the oath of a party to the case or by other competent evidence."

Section 9701, Rev. Laws of Haw. (1945), as amended:

> "Section 9701. Qualifications. The Supreme Court shall have the power to examine, admit and reinstate as practitioners in the courts or record such persons of good moral character who are citizens of the United States of America, and who have taken the prescribed oath of office, as it may find qualified for that purpose, but no person shall be examined, admitted or reinstated unless he is qualified under the Hawaiian Organic Act to vote in the Territory of Hawaii and shall have actually registered as such voter; and the Supreme Court shall have the sole power to revoke or suspend the license of any such practitioners or to dismiss or suspend them from the roll of practitioners for malpractice, fraud, deceit or other gross misconduct."

Rule 19, Rules of the Supreme Court of the Territory of Hawaii, as amended October 31, 1953. (39 Haw. 707). Text set forth in Appendix, pages 77-79.

Rule 19, Rules of the Supreme Court of the Territory of Hawaii, as amended April 21, 1954 (unreported). Text set forth in Appendix, pages 80-83.

Rule 15(d), Rules of the Supreme Court of the Territory of Hawaii (effective October 3, 1955). (40 Haw. 764). Text set forth in Appendix, page 84.

Rule 1, Rules of Civil Procedure for the United States District Court for the District of Hawaii (as amended and effective March 21, 1955) (unreported). Text set forth in Appendix, pages 85-87.

Statement of the Case.

The Judgment and Its Effect.

The court below affirmed the judgment of the Territorial Court that petitioner "be suspended and prohibited from practice, either directly or indirectly and in any manner whatsoever" for a period of one year.[3] [R. 118.] As already indicated this suspension has the effect of disbarment.

The Proceedings in the Territorial Court.

This case originated with a complaint of the Bar Association of Hawaii filed July 8, 1954 [R. 3, 4], alleging unprofessional conduct by reason of (a) things said by petitioner in a speech given at Honokaa, Hawaii, on December 14, 1952 and during the trial of a case entitled *United States v. Fujimoto* in the District Court for the District of Hawaii,[4] she being one of counsel therein, and (b) interviews in late June, 1953, of a juror in that case after verdict.[5]

Following a hearing on the complaint before the Legal Ethics Committee of the Territorial Court, and upon the report of that Committee [R. 14-18] the Territorial Court ordered petitioner to show cause why the findings, conclusions and recommendations of the Committee should not be adopted. The matter was argued and submitted to the Territorial Court upon the record made before the Legal Ethics Committee.

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[3]That judgment was stayed, pending appeal, by the court below. [R. 624.]

[4]That cause arose upon an indictment charging conspiracy to violate the Smith Act (18 U. S. C. 2385). The judgments of conviction were later reversed by the court below. *Fujimato v. United States*, 251 F. 2d 342.

[5]The complaint as to the juror episode was amplified by a bill of particulars. [R. 5-13.]

The Evidence and the Findings—the Honokaa Speech.

Petitioner made a speech at the time and place and under the circumstances alleged. The *Fujimoto* case was then at trial in Honolulu before the Honorable Jon Wiig, United States District Court Judge for the District of Hawaii. Honokaa is situated on a different island from Honolulu some 182 miles distant.

It was charged and the Territorial Court found that under these circumstances and concerning that trial, petitioner had said that horrible and shocking things were going on; that a fair trial was impossible; that all of the rules of evidence were being scrapped so the Government could make its case; that the rules of evidence and procedure were made up as the case proceeded; and that unless the trial was stopped in its tracks certain new crimes would be created. Upon these findings that court made the following conclusions:

> ". . . she engaged and participated in a wilful oral attack upon the administration of justice in and by the said United States District Court for the District of Hawaii and by direct statement and implication impugned the integrity of the judge presiding therein and in the said pending case, within the territorial boundaries of the Territory of Hawaii, and thus tended to also create disrespect for the courts of justice and judicial officers generally, . . . She has thus committed what this court considers gross misconduct." [R. 118.]

There is no transcript or other verbatim account of petitioner's speech. A newspaper reporter named Matsuoka took longhand notes preparatory to writing the newspaper article referred to by the majority below. [R. 152, 153, 559, 560.] A later version of these notes,

"slightly expanded" and prepared at the request of Matsuoka's editor following the "to-do about it in court" [R. 152, 153, 156, 159, 160] was received in evidence. The dissenting judges below accepted as accurate the version of petitioner's speech contained in these notes. Petitioner accepts them as the best available evidence of what she said.[6]

We summarize these notes:[7] (1) the trial is really of Jack Hall to get at the I. L. W. U.; (2) she wanted to tell about some rather *shocking and horrible things that go on at the trial;*[8] (3) MEN IN POWER are trying to put people in jail for what they think or read; (4) this is a conspiracy case and the GOVERNMENT uses conspiracy when it does not have a case—"conspiracy means to charge a lot of people for agreeing to do something you have never done"; (5) there is a myth about F.B.I. AGENTS—they spend their time investigating people's minds while hundreds of tax fraud cases go unpunished; (6) PAUL CROUCH is a witness because he was in Hawaii in 1924. His testimony of what he did in Russia in 1927 has no bearing; that was when Fujimoto was four years old and Hall was 13. He testified for weeks without mentioning a defendant; (7) a man should be responsible only for his own acts, not others; this is smear, part of the GOVERNMENT's propaganda that started before the

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[6]Petitioner also gave a near-contemporaneous version of her speech when she reported to Judge Wiig on the first court day after the speech had been given. Her statement is set out at R. 578-584.

[7]The notes are set out *in haec verba* at R. 573-578, and they are summarized in the dissent. [R. 593-595.]

[8]In this summary the words which are italicized pertain to the findings of the lower courts; they are set out in the precise language of the notes. The words in capital letters indicate the subject of most of the ideas and the objects of petitioner's criticisms.

jury was selected; (8) CROUCH testified to things no one could remember 12 years; (9) "THEY" use this kind of testimony "because THEY will do anything . . . to convict"; (10) the GOVERNMENT deliberately uses witnesses whose testimony is different from previous testimony and "have him say things in order to convict," "witnesses testify what the GOVERNMENT tells them to"; (11) JOHNSON testified about books in a duffel bag and Jack Hall is said to have violated the Smith Act because he saw a duffel bag with books in it. The GOVERNMENT reads from the books, "they're not dealing with what Jack Hall said"; (12) the GOVERNMENT has carried on a propaganda barrage so long that "just hearing about communism is enough to jail"; (13) the F.B.I. pressures people to testify and causes them to lose their jobs if they won't cooperate and become informers; (14) *There's no such thing as a fair trial in a Smith Act case. All rules of evidence have to be scrapped or the government can't make a case;* (15) in the *Palakiko-Majors* case[9] testimony of an admission of having coerced a confession was excluded because the declarant was not available to deny it but in the same situation a federal judge let CROUCH testify about 27 years ago when a defendant was five years old; (16) *There's no fair trial in the case. They just make up the rules as they go along;* (17) in 1949 Judge Medina permitted evidence as to what the defendants did from 1934 on, "but the GOVERNMENT can't make a case if it tells just what they did so THEY widened the rules and tell what other people did years ago . . . including the kitchen sink"; (18) *Unless we stop the Smith trial in its tracks here there will be a*

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[9]See *Palakiko v. Harper* (9 Cir.), 209 F. 2d 75; cert. den. 347 U. S. 956. Petitioner was counsel of record there.

new crime. People will be charged with knowing what is included in books. Ideas; (19) we are threatened with "dark ages of thought control when people won't be able to speak freely"; (20) "she urged her audience to go out and explain what a vicious thing the Smith act is."

The testimony of the witnesses concerning the Honokaa speech is fragmentary in the extreme. They give only snatches from the speech and make no attempt to present its full text or to set the isolated remarks in their context. No witness attempts to quote petitioner's language. The testimony of each witness is summarized below.

Matsuoka (newspaper reporter, "Hilo Tribune Herald"):

> ". . . She said she wanted to tell the people about some of the shocking, horrible things that went on, and that the Smith Act trial could not be a fair one, and that they just had to go around and make rules to fit the situation. That was, I think, the general trend." [R. 151.]

On cross-examination he gave this testimony:

> "Q. It [petitioner's speech] was a general criticism as to the character of the criminal proceedings brought under the Smith Act, isn't that a fair statement? A. Yes, a portion of that speech, I think." [R. 161.]

Ferreira (worker at Honokaa Sugar Company):

> "She started off telling us about the Smith Act trial; that there was no fair trial in the Smith Act case; that the government—I mean, they made up their rules as they went along in Smith Act trial, and she compared the Majors-Palakiko case with the Smith Act trial, and she also stated that in the Smith Act trial they tried you on a conspiracy, and

'conspiracy' was explained to us, not the exact wording, but was something that they tried you for, for your thoughts; in other words, something that some people think, or you might think of, or this person might think of doing some day, but never actually did, but that is how she explained it on this conspiracy. * * *

Q. Did she mention any particular locality when she was talking about the Smith Act trial? A. If I remember right it was in Honolulu, but I am not too sure about that; I think it was down here." [R. 163-164.]

John D. Morse (Industrial Relations Director, Honokaa Sugar Company):

"Yes, I recall a few things. I did hear her say that there is no such thing as a fair trial in a Smith Act case, and she said that. Well, she talked quite a bit about Jack Hall, Mr. Hall was there; about the trial that was going on at that time. Q. Did she in anywise talk about the rules of evidence in the Smith Act trial? A. Yes. I don't remember word for word, naturally, but she did say that in a Smith Act case that the government permitted evidence that was primarily in their favor—in favor of the government. [R. 165.] * * * Q. Mr. Morse, do you remember Mrs. Bouslog making any statement as to whether there was such a thing or not as a fair trial in the Smith Act case? A. I remember her saying there was not such a thing as a fair trial in a Smith Act case. [R. 167.] Q. And do you remember whether she referred to the conduct and manner in which it was being handled? A. Well, it tied in, I figured it, tied in with any Smith Act case, whether in Honolulu, New York, or whatever it was; that is the impression I got from what she said." [R. 167.]

Olival (Women's Editor, "Hilo Tribune Herald"):

". . . . She said that the trial was against Jack Hall, and six others were just brought in, and that its purpose was to get at the ILWU; she said that Jack Hall was being tried on something that he read many years ago, and she said that in the Smith Act trial there were no rules, and that they were making up the rules as they went along, and she said that the F.B.I. could be called Federal cops, and that when the government—they were stressing this case, and when the government—that witnesses were afraid to testify, and they testified usually what the government wanted them to testify. * * * Q. Mrs. Olival, did Mrs. Bouslog use a phrase indicating that there were rather shocking and horrible things that were going on at the trial? A. Yes, she used those." [R. 171-172.]

Ramos (clerk, Honokaa Sugar Company):

"I said she said there was no fair trial in the Smith Act case. * * * It has been so long that most of it I have forgotten." [R. 179.]

Andrade (worker, Honokaa Sugar Company):

". . . She said she would like to tell the audience of the horrible and shocking things that went on at the Smith Act trial in Honolulu, and she also gave several illustrations, but, I am sorry, I cannot remember them, and she also said that the Federal government had created the evidence as they went along, and she referred to the F.B.I. men as Federal cops, at which time she received hearty applause from the audience. There were approximately 250 people present. Most of them were union members, . . ." [R. 180-181.]

Crabb (office manager of Paauhau Sugar Plantation Company):

"Q. Will you tell the Committee what Mrs. Bouslog said? A. Well, that the defendant in the Smith Act trial cannot get a fair trial. Q. What Smith Act trial was she talking about? A. The one in Honolulu. Q. Did she say anything else? A. And in regard to the communism books, she said those who read those books might be prosecuted." [R. 183.]

Phyllis P. Morse (wife of John D. Morse):

". . . . she said that there was no such thing as a fair trial under the present Smith Act case in Honolulu, and that the newspapers were not giving a full account, a true account, and that from time to time they and we would be coming to the various islands to acquaint a group with the true facts. . . . that the government could submit any evidence they liked at any time, and that they could also use books that might not have any bearing on the case. . . . she gave various examples of things . . . that were going on, in what she called the horrifying, shocking trial." [R. 184-185.]

Hall (Regional Director for International Longshoremen's & Warehousemen's Union, defendant in Fujimoto case):

testified that he, not petitioner, made the "horrible and shocking things" remark. [R. 395.] He said that petitioner did not say the judge was making up the rules of evidence as he went along. [R. 397.] Petitioner said there were different rules of evidence in a Smith Act trial "as compared to the normal criminal trial." She criticized "the rules, not the rulings." [R. 397.]

The meeting was called by the I.L.W.U. defense committee which had been established to handle and finance the defense of Hall and other union members involved in Smith Act and related matters. [R. 401, 402.] The Honokaa meeting was "in the nature of a report back to those that contributed to [Hall's] defense." [R. 410.]

Petitioner:

Concerning the "horrible and shocking things" remark, petitioner testified at her hearing: "Two days afterward I stated to Judge Wiig that I had no recollection of ever making any statement of any kind of that character or having said those words." [R. 435.] She testified that she had said "There is no such thing as a fair trial in the Smith Act case." [R. 443.] She said she "was talking about the Smith Act and the Smith Act in general. . . . that there was no such thing as a fair trial in any Smith Act case." [R. 444-445.] She supplied her authorities for the view that under conditions existing at the time of the Honokaa speech, a Smith Act trial for Communists could not be fair. [R. 445-448.] Her purpose was to provide her audience with sufficient information to persuade them to the conclusion that the Smith Act "was a bad law which should be repealed." [R. 448.]

She denied saying "All rules of evidence have to be scrapped or the government can't make a case," and stated that her references to rules of evidence dealt with the explanation of the difference between those rules in a conspiracy case and in an ordinary criminal case, pointing out that the government took advantage of "a latitude under the rules of evidence in conspiracy." [R. 443-444.]

Concerning the alleged remark that unless the Smith Act trial were stopped a new crime would be created, petitioner said that her remarks in substance were these:

"I said that the Smith Act—continued prosecutions under the Smith Act can lead to a new crime of reading and thought control . . . . And I said that I felt that the Smith Act would be repealed as soon as people understood what the Smith Act was." [R. 459.]

Petitioner gave a narrative report of her speech to Judge Wiig on December 16, 1952, two days after the Honokaa meeting. [R. 578-584.] It will not be summarized here because in general it so closely parallels Matsuoka's notes. In this statement she admitted having said "there is no such thing as a fair trial in a Smith Act case." She said that she had explained this on the grounds that books were on trial and that the Government's pre-trial propaganda had created an hysterical climate of public opinion. [R. 578, 579.] Petitioner denied having said, "that all rules of evidence have to be scrapped or the Government can't make a case and just make up the rules as they go along, or words to that effect." [R. 582.] She said that she had no recollection of having said "that some rather shocking and horrible things were going on in this trial." [R. 582.] She told Judge Wiig that her criticism of the conspiracy prosecution was "drawn from authorities already cited to the court" [R. 580], and that her observations concerning the prosecutor's abuse of the latitude of admissibility of evidence in conspiracy trials were "in substance" what had been stated to the court in defense memoranda already

submitted in support of motions to strike.[10] [R. 580, 582.] Her statements in this respect have never been controverted. As the dissenters below read the Fujimoto record, petitioner was here referring to motions directed at the witness Crouch.[11] [R. 603.]

The Evidence and the Findings—The Interviews of the Juror Fuller.

Petitioner paid three visits in as many days to the home of one David Fuller, a juror in the *Fujimoto* case, beginning at a time about four days after the verdict in that matter had been returned. The initiative for these interviews came from a sister of the juror [R. 314, 210, 432], who reported that he had said that he wanted to confess that the case was a "frame-up." [R. 314.] Petitioner entered the juror's home with no objection from either the juror or his wife. [R. 316, 210, 472.] His wife confirmed to petitioner the report of the sister. [R. 476, 477.] The juror made similar statements to petitioner at the first visit. [R. 477, 318-321.] At petitioner's suggestion Fuller agreed to talk with Hall, one of the convicted defendants. [R. 322.]

Petitioner returned next day with Hall, when, partly as a volunteered statement and partly in response to questioning, the juror related a number of things that went on in the juryroom during deliberations. Most of the things set out in petitioner's affidavit to the trial judge [R. 42-45] were stated by the juror in the course of

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[10]Judge Wiig originally admitted Crouch's testimony subject to a motion to strike. His final ruling on the question came long after the Honokaa speech. [R. 398, 599.]

[11]Crouch was one of the "three perjurious witnesses" whose testimony tainted the record in *Communist Party v. SACB*, 351 U. S. 115.

this interview. [R. 487-495.] Both petitioner and Hall questioned the juror from time to time. [R. 418, 419, 495.][12]

Petitioner prepared an affidavit covering these interviews which was submitted to Judge Wiig in support of a motion for a new trial in the *Fujimoto* case. [R. 33-47.]

The Territorial Court held the interviews to be "gross misconduct" but apparently did not base its disciplinary judgment thereon. [R. 120, 121.] This interpretation of its action is reinforced by the court's finding that the practice of post verdict interviews of jurors "has not been uncommon, if not in fact common practice." [R. 119.] The majority below, however, read the Territorial Court's opinion as "a statement that the penalty for the two charges is imposed concurrently," although conceding that "the matter is not clear." [R. 568.] The court below said that, if it were reversing on the first charge (the speech), it would "refer the matter back to the Territorial Court to determine clearly and anew what sanction it intended to apply in the second charge." [R. 568.] It then proceeded to hold that "the evidence sustains the second charge." [R. 568.]

The Genesis of the Charges.

The origin of the charges against petitioner reveals a curious development of the rules of the Territorial Court so as to effect a special application to this case. The conduct laid against petitioner was engaged in while she was acting as one of counsel of record in the District

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[12]On the third visit there was apparently no discussion with the juror of matters which went on in the jury room. [R. 217, 218, 419, 420.]

Court and in relation to a case pending there. The investigation ordered by Judge Wiig [R. 31, 33] evoked no contempt or disciplinary proceedings in his court. At the end of the trial he complimented all counsel, including petitioner, for their "assistance, conduct and demeanor." [R. 510, 524.]

When the trial was over Judge Wiig, without indicating any position in the matter, asked the local bar association "to look into the conduct of Harriet Bouslog in connection with the Smith Act trial." [R. 539-541.] The bar association took no action while the matter was investigated by the Attorney General of the Territory. [R. 535, 536.] As the rules of the Territorial Court then stood, only the aggrieved party or the Attorney General could file complaints of attorneys' misconduct. (See App. p. 77.) When the Attorney General took no action the bar association devised an amendment to the Territorial Court's rules permitting the association to file such complaints. (See App. p. 80.) That rule was adopted in April, 1954, and the complaint was filed July 8, 1954, some 18 months after the Honokaa speech and over a year after the juror interviews. [R. 535, 536.]

The report of the Legal Ethics Committee was not made until July 1, 1955. [R. 15.] The Territorial Court's decision was rendered April 6, 1956 [R. 93 ff.]; that of the court below on June 9, 1958.

Petitioner's Professional Record.

Petitioner has been a member of the bar since 1936, in the Territory since 1941. [R. 428.] Her professional career has been exemplary. Commenting that "this is no ordinary case" [R. 589; see also R. 611-616] the dissenters below alluded to petitioner's distinguished record of representing unpopular clients. But this has been a

career which involves even more than representing victims of public prejudice or passion. Petitioner's professional career in the Islands has encompassed the emergence of unionization among the workers in the vast sugar and pineapple plantations as well as in the longshore industry of the Territory. The conflict of forces thus precipitated led not only to strike turbulence in the struggle for improved working and living conditions, but also to pressures to alter both law and custom affecting the social, civic and political participation of the great non-white masses in the community life of the Islands.[13] In this milieu petitioner served as lawyer for the workers, and her endeavors involved her in strike and picketing cases and the application thereto of national and local statutes; criminal prosecutions; challenges to the constitutionality of criminal statutes and jury selection systems; and suits to prevent racial discrimination. It is not an exaggeration to say that petitioner's work in these areas contributed to the resolution of profound and potentially explosive social conflicts through the processes of law and reason rather than by violence and destruction.

Out of the sugar strike in 1946 emerged the issues which led to the challenge to the Territorial statutes dealing with conspiracy and unlawful assembly and riot, as well as the practices in selecting grand and petit juries in the Territorial courts. Petitioner was counsel for plaintiffs in those cases and her position was sustained

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[13]See *e.g. International Longshoremen's and Warehousemen's Union v. Ackerman*, 82 Fed. Supp. 65, 74-86, 95-112, 113-122 (opinion by Circuit Judge Biggs), reversed 187 F. 2d 860 (9 Cir.), cert. den. 342 U. S. 859; *United States v. Fujimoto*, 105 Fed. Supp. 727, 729, opinion by Circuit Judge (now Chief Judge) Stephens. Both opinions contain penetrating analyses of the social conflicts in which petitioner served as a lawyer, helping to preserve and advance our cherished notions of rule by law.

by a three-judge court presided over by Circuit Judge Biggs of the Third Circuit. *ILWU v. Ackerman, supra.* Although the decision of that court was reversed on appeal for procedural reasons, the statutes on conspiracy and unlawful assembly and riot were modified or repealed to conform more closely with the positions advanced by respondent and approved by the three-judge court.[14] So also was the jury system modified in Territorial courts on the islands of Oahu, Maui and Hawaii.[15] Petitioner presented the challenge to the jury selection system in the District Court of Hawaii which was determined in *United States v. Fujimoto, supra.*

Also growing out of that sugar strike was litigation attacking the labor injunction practices of the Territorial courts and asserting the national policy enunciated in the jurisdictional limitations of the Norris-LaGuardia Act (29 U. S. C. A. 101 ff). *ILWU v. Wirtz,* 37 Haw. 404, 445; aff'd. 170 F. 2d 783, 9 Cir., cert. den. 336 U. S. 919, rehearing denied 336 U. S. 971. In another phase of the same attack was the suit brought under the civil rights statutes of the United States to restrain prosecutions under *ex parte* labor injunctions. *Alesna v. Rice,* 69 Fed. Supp. 987, complaint dismissed 75 Fed. Supp. 865, aff'd. 172 F. 2d 176, 9 Cir., cert. den. 338 U. S. 814. In both of these cases petitioner was counsel for the unsuccessful plaintiffs.

In 1947 there occurred an industry-wide strike in the pineapple industry. Widespread actions by the employers

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[14]The original statutes, Sections 11120 ff. (conspiracy) and Sections 11570 ff. (unlawful assembly) Rev. Laws Hawaii, 1945, were amended and in part repealed by Acts 10 and 62 respectively. Special Session Laws of Hawaii, 1949.

[15]This was done by judicial order and there is no official report.

to restrain picketing[16] were countered by efforts to enjoin the activities of the employers in the Federal courts under the civil rights statutes.[17] Petitioner represented the defendants in the actions brought by the employers and the plaintiffs in the actions brought under the civil rights statutes.

Petitioner represented the first public employee in the Territory to be dismissed for asserted connection with the Communist Party. She brought an unsuccessful action to enjoin the school board proceeding as violative of the federal civil rights statute (*Reinecke v. Loper* (D. C. Hawaii), 77 Fed. Supp. 333), and as well participated in his defense in the hearing before the Honolulu school commission. Later she represented witnesses asserting constitutional reasons for resisting political inquisition by the House Committee on Un-American Activities. When 39 of these persons were prosecuted for legislative contempt, petitioner and her partner represented them and gained their acquittal.[18]

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[16]*Hawaiian Pineapple Co., Ltd. v. I.L.W.U.*, Eq. No. 4729, First Judicial Circuit, Judge Willson C. Moore; *California Packing Corporation v. I.L.W.U.*, Eq. No. 4730, First Judicial Circuit, Judge Willson C. Moore; *Hawaiian Pineapple Co., Ltd. v. I.L.W.U.*, Eq. No. 322, Second Judicial Circuit [Maui], Judge Cable A. Wirtz; *Hawaiian Fruit Packers v. I.L.W.U.*, Eq. No. 123, Fifth Judicial Circuit [Kauai], Judge Phillip L. Rice; and *Hawaiian Canneries, Ltd. v. I.L.W.U.*, Eq. No. 122, Fifth Judicial Circuit [Kauai], Judge Phillip L. Rice.

[17]*Hall et al. v. Hawaiian Pineapple Company, Ltd.*, Civil No. 801, U.S.D.C., Hawaii, 72 Fed. Supp. 533; *Hall v. California Packing Corporation*, Civil No. 802, U.S.D.C., Hawaii; *Hall v. Willson C. Moore, as Judge of the Circuit Court of the First Judicial Circuit*, Civil No. 803, U.S.D.C., Hawaii; and *Hall v. Willson C. Moore, as Judge of the Circuit Court of the First Judicial Circuit*, Civil No. 804, U.S.D.C., Hawaii.

[18]See *United States v. Abe* (D. C. Hawaii), 95 Fed. Supp. 991, for ruling on preliminary motions; judgment of acquittal unreported.

In 1951-1953 petitioner helped save from execution two men who had been convicted of first degree murder under circumstances strongly indicating the influence of racial passion and prejudice upon the trial. Her attempts to obtain a writ of habeas corpus on these grounds were unsuccessful. *Palakiko v. Harper,* 39 Haw. 141, 39 Haw. 16, aff'd. (9 Cir.), 209 F. 2d 75, cert. den. 347 U. S. 956, rehearing den. 347 U. S. 979.[19] After the denial of certiorari, however, the Governor of Hawaii, Honorable Samuel Wilder King, commuted the death sentence to life imprisonment.

Finally, petitioner was one of counsel for the defendants in the only prosecution in the Territory for conspiracy to violate the Smith Act, *United States v. Fujimoto, supra.* The litigation in this matter was varied and bitter. It involved disqualification proceedings against District Judge McLaughlin reported at 101 Fed. Supp. 293, which was followed by application to the United States Court of Appeals for the Ninth Circuit for a writ of prohibition (9 Cir., No. 13283), after the submission of which Judge McLaughlin withdrew voluntarily; a challenge to the jury selection system, heard by Circuit Judge (now Chief Judge) Stephens and denied in his opinion reported at 105 Fed. Supp. 727; an application for a writ of prohibition bottomed on the jury selection practices alleged in the challenge which was denied by the Court of Appeals for the Ninth Circuit (*Fujimoto v. United States* (9 Cir.), 199 F. 2d 27) and by this Court, Mr. Justice Black dissenting, 344 U. S. 852; as well as numerous pre-trial motions submitted to Judge McLaughlin (102 Fed. Supp. 890) and later to Judge Wiig.

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[19]This is the "Palakiko-Majors case" referred to in the Matsuoka notes of petitioner's Honokaa speech. [R. 577.]

(107 Fed. Supp. 865.) The trial in that case lasted from November 5, 1952 to June 20, 1953. [R. 398.] Petitioner was counsel of record therein continuously from August 31, 1951, two days after the indictment was returned. [R. 141.] It was in connection with this case that Judge Wiig commended and thanked all counsel for their service to the court and their conduct and demeanor throughout the trial. [R. 510.]

Petitioner's professional career in the Islands has been marked with extensive service at focal points of social conflict. In some instances these were challenges to laws, practices and mores that buttressed the economically powerful and the racially favored. Such cases presented thrusts at the *status quo* powered by a deep-going realignment of social and economic forces. In other respects petitioner sometimes represented those called the little people whose rights often exceed in importance their economic capacities to secure them. In still others she represented the victims of public passion and prejudice as in the *Palakiko-Majors* case and the Smith Act case. Petitioner appears to have served in the noblest traditions of the bar, and no one mindful of the tensions created by profound social conflict can deny that she has made a contribution to government by law.

Summary of Argument.

1. The finding that in petitioner's Honokaa speech she impugned the integrity of Judge Wiig is arbitrary and not supported by the evidence. We deal here with verbal utterances orally evidenced. To be reliable such evidence must give the remarks with precision and in context. The testimony of the witnesses is fragmentary and fails to meet that standard. There are two con-

temporaneous versions of the speech as a whole. Matsuoka's longhand notes, "expanded" *post litam motam* as it were, and petitioner's oral report to Judge Wiig. We will rest our analysis on the notes, although their origin weakens their reliability and restricts the inferences to be drawn from them when based on interpretation of their meaning.

The court below, in an apparent reversal of ordinary analysis, seems to have rested its conclusions on a newspaper article (which is manifestly incomplete and takes remarks out of context) because the findings of the Territorial Court "implicitly sustain the accuracy of the published items."

The court below evinced no effort at studying the critical remarks in context. As the notes show petitioner was critical of the Smith Act trial then pending before Judge Wiig because it was a thought control and book reading trial, because it was a trial for conspiracy rather than the substantive offense, because as a conspiracy trial there was a prejudicial latitude in the admission of evidence, because the government's propaganda created a climate of hysteria and fear, and because the government used unreliable witnesses. This is not an attack or reflection upon Judge Wiig.

Studied in context the isolated remarks found against petitioner cannot properly be given a meaning as an attack upon the court or as impugning the judge's integrity. Moreover, taken alone and on their face, those remarks as found do not support the findings.

Considering the evidence as a whole, it is unreliable and dubious. It is a layman's effort to reproduce a lawyer's explanation, to laymen, of complex legal concepts. This is evidence, of a speech filtered through an imperfect

understanding and resting on the chance use of words by a hurried news reporter taking longhand notes.

There is no evidence which "rationally justifies" the findings. The court below failed to make its own appraisal of the evidence and to apply the requisite standard of proof—viz. clear and convincing. The offense of bringing disrespect on the courts is narrowly defined to preserve the independence of the bar. It encompasses only utterances which threaten the person or reputation of the judge, or charge him with knowing abuse of his powers, or accuse him of political or corrupt motivation. The facts do not make out such an offense here. As applied here, the offense found against petitioner is an obstruction to the independence of the bar.

2. The discipline imposed abridges freedom of expression. If the Honokaa speech had been given by a layman, there would be no question of its protection under the rule of *Bridges v. California*, *Pennekamp v. Florida* and *Craig v. Harney*. The court below sanctioned a proscription upon this utterance solely for the reason that it had been made by a lawyer of record during the pendency of his case. Its holding is incompatible with informed discussion of important social issues. Pending cases often raise serious questions that can be most meaningfully discussed while the case is pending and most helpfully discussed by the lawyer of record. The lower court's concepts that the courtroom is the only forum in which the lawyer may "vindicate his clients" and that "the judicial process is entitled to protection from those who get their license from a judicial temple" misconceives the purpose of public discussion and its value in a free society. They also posit an obligation of "loyalty" toward courts which undermines effective

advocacy. Aside from the limitation imposed on all citizens under the rule of Bridges, Pennekamp and Craig, the utterances of the lawyer of record would seem to be qualified only by his duty not to bring the courts into disrespect. In this area, the cases forbid speech which (a) threatens the person or reputation of the judges, (b) charges him with wilful abuse of his authority, or (c) lays against him corrupt or political motivation or conduct. The utterances here fall far short of this. These limitations operate on the basis of the lawyer's relation to the court, not to a pending case. Research discloses no decisions forbidding or restricting lawyers' speech about pending matters in which they are of record, on that ground. The facts of this case do not necessitate the fashioning of any other limitation on the lawyer's freedom of speech. Any restriction based on the pendency of the case would foreclose informed comment on current matters of great social value.

The court below rejected the clear and present danger test. It utilized no method of balancing the interest in public confidence in and respect for the courts against the interest in informed and meaningful public discussion concerning important issues. It failed to specify the nature of the "restraints" it felt to be applicable only to lawyers or to indicate the circumstances in which they would be operative. Its standard of "unseemly" has been often rejected by this Court and is censorial.

On balance it would seem that the speech here should be entitled to First Amendment protection. It was generalized discussion, not an attack specifically levelled at a judge. The grievances she raised were real; certain of them had troubled bench and bar for many years and others presented problems that finally reached this Court.

of misunderstanding and distortion must be fully understood. Petitioner, perhaps rashly, undertook to explain to laymen the complex and difficult nature of a conspiracy prosecution and the evidentiary problems it creates. Lawyers and judges have difficulty with the articulation and application of the rules relating to admission of evidence and vicarious responsibility in conspiracy cases. A layman's recollection of an attempted vulgarization of these concepts must ineluctably be permeated with the untrustworthiness of which Wigmore speaks. (Op cit.) Yet it is upon this version of her speech filtered through the untrained understanding of a lay listener—combined occasionally with the chance use of the pronoun "they" by a hurried news reporter who did not take verbatim notes—that the findings which wreck petitioner's career finally rest. This is indeed an unsubstantial basis for such drastic action. It deserves the characterization "dubious evidence" made by the dissenters below. [R. 599.]

Finally it must be said that, taking them on their face, the remarks as found below do not constitute an attack upon Judge Wiig or his integrity. Lawyers, and judges, know that horrible and shocking things can and do occur in court rooms without any fault of the judge and without reflecting upon judicial integrity. Witnesses commit perjury. Prosecutors knowingly resort to perjured testimony. Lawyers badger witness and parties give vent to their passions and shout epithets and billingsgate at each other. The oppressive use of the conspiracy charge, the employment of professional informers and witnesses with their questionable veracity, the government's use of the anti-communist propaganda machine while invoking the machinery of a jury trial for Communist defendants, might well impress more than the participants in the *Fujimoto* trial as "horrible and shocking." And this,

The finding of attack on the judge rests upon implication from most uncertain evidence, particularly because the laymen's version of petitioner's speech represents imperfect recollection strained through necessarily incomplete understanding of a lawyer's exposition of technical legal concepts. In addition the notes are not a verbatim account but elliptical longhand note-taking and to place a gloss on such words so as to derive from them an attack upon the judge is to rest an inference upon an inference which in turn has no identifiable basis. Most of what petitioner said in her speech she had already presented to the court in motion papers. The speech was given to an audience almost wholly consisting of contributors to the defense she was conducting, and there is no evidence that petitioner sought publicity for her remarks. Petitioner's unblemished and distinguished record, plus her then position as one of defense counsel daily before Judge Wiig, negative any intent or purpose to impugn his integrity.

The things said and the circumstances of their utterance show no immediate threat to the dignity or public respect of the bench. We deal here with objective standards not subjective reactions. The Court will assume that the public will weigh all information about its judges and not be led off by a single utterance, especially where it lacks any direct impact upon or incitation against the judge or the judiciary.

The First Amendment standards employed by the lower courts have a serious effect on lawyer's advocacy. Lawyers must be free to criticize courts both to their face and publicly. Infringement in either area operates in both.

3. The interview of the juror was not gross misconduct and to hold it to be such undermines the ability

of the bar to protect clients and courts from tainted verdicts. Petitioner interviewed the juror after verdict and at the request of his sister and with the approval of his wife. Before doing so petitioner had been told that he had been acting irrationally and speaking of wrong doing and frame-up in connection with the case. The interviews were proper to ascertain whether the verdict was affected by the irrationality of the juror during the trial and whether there had been wrongdoing. This was not an effort to impeach a verdict by getting information concerning the jurors' thought processes. This is a case covered by early decisions of this Court sanctioning interrogation of the juror to ascertain "overt acts" which taint the verdict. The authorities cited by the Territorial Court and a prior holding of the court below are inapplicable because they involve interrogation merely with reference to jurors' reasoning processes in reaching their verdict. This aspect of the case involves the supervisory functions of this Court as respects a rule now applicable in at least two circuits.

4. The judgment of the Territorial Court, affirmed below, was beyond its jurisdiction. The federal court was the only court having jurisdiction. The Honokaa speech was delivered by petitioner while she was counsel of record in a case in the federal court. The quality of her conduct turned upon her relation to that court and the impact of her speech upon that court and the case at trial there. The juror interview was also conducted by petitioner as a practitioner in a federal court in respect of a juror

findings necessary to support the judgment of the Territorial Court had to rest upon a solidity of evidence that took into account the entire speech, the context of the assertedly offensive language and the fair meaning which reasonable minds having petitioner's familiarity with legal procedures would give to the words used, and it was for the court below to make its own evaluation of the evidence. *Bridges v. California,* 314 U. S. 252; *Pennekamp v. Florida,* 328 U. S. 331; *Craig v. Harney,* 331 U. S. 367. This Court will search the evidence to see that "no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings screening reality." *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.,* 312 U. S. 287, 293. The claim of deprivation of due process requires the same ransacking of the record. *Schware, Konigsberg, supra; Norris v. Alabama,* 294 U. S. 587. As a lawyer's discipline case the standard of proof was "clear and convincing," free from doubt,[29] and this standard necessitates similar reappraisal of the evidence on appeal. Compare *Schneiderman v. United States,* 320 U. S. 118, 122; *Knauer v. United States,* 328 U. S. 654, 658; *United States v. Bridges* (D. C. Cal.), 133 Fed. Supp. 638, 641, n. 5.

The lawyer's license, resting as it does upon the solemn judicial act of admission to practice at the court's bar (itself akin to a judgment) together with the oft-expressed concern of the court for the preservation of the lawyer's professional independence and freedom of speech, invokes, we submit, standards of proof and appellate review similar to those applicable in cases of

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[29]This is the rule of the Territorial Court (*In re Trask,* 30 Haw. 736, 740), and it is the universal view. Drinker, *Legal Ethics,* 1953, Columbia Univ. Press, p. 46.

of that court and connected with a matter pending in that court. The Territorial Court laid down rules of conduct for federal practitioners in cases pending in the federal court. This intimately affects the administration of justice in the federal court. This is not the kind of case where the lawyer commits an offense such as stealing, where the nature of the offense is established, all jurisdictions condemn it and the only issue is whether it was done. The very quality of the conduct for disciplinary purposes turns on the relation of the lawyer and his acts to the court wherein he was practicing at the time and its effect in the matter pending there. This is a question of reserving to the federal court the management of its own affairs in matters which derive their significance from the close relationship of the attorney's conduct to the administration of justice.

Given the special circumstances here and the federal constitutional rights involved, the only sound approach would have been to have this matter determined in the federal jurisdiction. There it would have been better insulated from local pressures and influences.

If by federal standards petitioner had been disciplined in the federal courts, then it would have been appropriate for the Territorial Court to act. This is the true meaning of *In re Isserman,* relied upon by both lower courts.

ARGUMENT.

POINT ONE.

The Findings of the Territorial Court, Affirmed Below, That Petitioner's Honokaa Speech Was a "Wilful Oral Attack Upon the Administration of Justice . . . in the . . . District Court" and "by Direct Statement and Implication Impugned the Judge" Are so Arbitrary as to Offend Due Process.

In assaying this record concerning the Honokaa speech it is essential to observe both the thing to be proved and the evidence used. The thing to be proved is a series of verbal utterances made at a public meeting almost two years before the disciplinary proceedings began. There is no question that the speech was extemporaneous [R. 24, 25, 179], and no verbatim record ever existed. The evidence used to prove these utterances consists of (a) the testimony of eight witnesses to what they could recall having heard some two years before and (b) the nearly contemporaneous notes of Matsuoka [R. 753 ff.] and the equally contemporaneous report of petitioner to Judge Wiig. [R. 578 ff.] The testimony of the eight witnesses,[20] summarized in our statement of the case, *ante,* was fragmentary in the extreme. Often extracted by prodding and leading questions, it is confined only to the remarks charged in the complaint. No attempt was made to elicit from these witnesses the full speech or the context of any particular remark. Nor was there any effort to develop petitioner's statements with any precision.

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[20]Matsuoka [R. 145 ff.], John D. Morse [R. 164 ff.] Olival [R. 171 ff.], Ferreira [R. 162 ff.], Crabb [R. 182 ff.], Phyllis Morse [R. 184 ff.], Ramos [R. 178 ff.], Andrade [R. 180 ff.].

denaturalization and what Judge Goodman describes in the *Bridges* case, *supra,* as "claims which have serious social consequences or harsh or far reaching effects on individuals." As to this Court's recognition of solicitude for the harsh and far reaching effects of disbarment, see *Bradley v. Fisher,* 13 Wall. 335, 355.

The standards of proof imposed by these considerations cannot be satisfied by equivocal evidence. Absent the unsupported gloss placed upon "they" by the court below each of the remarks found can reasonably be read as not pertaining to the judge. In their context these remarks cannot rationally be read as referring to the judge at all. Where an utterance can be reasonably read as having an innocent meaning the imperatives of the First Amendment deprive it of probative force for guilt. *Schneiderman v. United States,* 320 U. S. 118, 157-159; *Baumgartner v. United States,* 322 U. S. 665, 674, 675; *Hartzel v. United States,* 322 U. S. 680, 687-690; see also *Fiske v. Kansas,* 274 U. S. 380.

The arbitrariness of the fact finding menaces a grave abridgment of professional independence. The "gross misconduct" found by the two lower courts is that which the American decisions usually define as failing to maintain the respect due the courts.[29a] But the need that the "independence of the bar" be "scrupulously guarded" (*Ex parte Secombe,* 19 How. 9, 13) has dictated that the offense be narrowly drawn. The test is whether the lawyer's utterance is marked with an enormity inconsistent with the court's ability to maintain public respect or subversive of the proper administration of justice. *Bradley v. Fisher,* 13 Wall. 335, 354. Punishment is not an object.

[29a] American Bar Association Canon Number 1 (A. B. A. Canons of Pro. Ethics, 1957, p. 1) would seem to be a codification of the concept worked out in earlier American decisions, most of which are cited in the next three footnotes.

Ex parte Wall, 107 U. S. 265, 288. The offense encompasses only utterances which threaten the person or reputation of the judge,[30] or charge that he has knowingly misused his powers in a particular case,[31] or claim that the

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[30]*Bradley v. Fisher, supra*, the attorney accosted the judge in a "rude and insulting manner" and threatened him with personal chastisement; *Elliott v. Green*, 7 Colo. 237, 3 Pac. 65, the attorney halted the judge on the street, addressed him in "abusive, insulting and threatening language" concerning his action in a pending matter and threatened to expose him in the newspapers; *In re Collins*, 147 Cal. 8, 81 Pac. 220, attorney made statement to press while matter pending before judge accusing latter of malfeasance and incompetence in office; *Chicago Bar Assn. v. Metzgen*, 291 Ill. 55, 125 N. E. 734, attorney wrote judge after latter set aside divorce decree threatening to sue judge, describing his action as "dastardly" and calling judge "irresponsible political mannikin"; *Johnson v. State*, 152 Ala. 93, 44 So. 671, attorney wrote judge that he should treat attorney as gentleman or attorney would know why and accusing judge of meeting with prosecutor to plan how and why a certain accused would be tried.

[31]*In re Hilton*, 48 Utah 172, 158 Pac. 691, attorney in speech said that in its decision the court had been dominated by fear of the Mormon Church and had committed judicial murder; *State Board v. Hart*, 104 Minn. 88, 116 N. W. 212, the attorney wrote a letter to the Chief Justice of the Supreme Court and released a copy to the press, commenting upon a recent decision of the court, saying that it had assigned the property involved to one who had no better right to it than a burglar, that this was like robbing a widow, that the court had acted as a "fence," that the court either had emasculated intelligence or constipation of morals or faithlessness to duty, that the court was either unlearned in the law or not honest; *In re Humphrey*, 174 Cal. 290, 163 Pac. 60, attorney issued an election pamphlet attacking a judge for the handling of two cases in which he said, *inter alia*, that the judge had used his powers to enable a bank to keep money that another was entitled to; *State v. Breckenridge*, 126 Okla. 86, 258 Pac. 744, the attorney wrote a newspaper article referring to recent action of the Supreme Court of Oklahoma in which he stated erroneously that the Supreme Court had suspended the writ of habeas corpus, had an interest in the outcome of the case, and acted like a star chamber; *Wilhelm's Case*, 269 Pa. 416, 112 Atl. 561, during the pendency of a disbarment proceeding against another lawyer, the attorney made an "impassioned" speech saying that the disbarment proceeding was a conspiracy to crucify that lawyer and urging political action to prevent it; *In re Breen*, 30 Nev. 164, 93 Pac. 997, commenting upon a decision of the Supreme Court of the state reversing a murder conviction, the trial judge said that the opinion of the Supreme Court was an abnormal document, that it was either reprehensible or

The treachery of such evidence as proof of verbal utterances, as well as the need for the most careful proof which sets out the utterance as a whole with full context and sedulous precision, has long been recognized. As Wigmore has it,

> ". . . verbal utterances differ from other acts or events in an important way, which calls for special caution in evidencing them . . . . Verbal utterances are attempts to express ideas in words. The more complicated the idea, the more elaborate is the structure of the verbal utterance. . . . . It follows that the thought as a whole, and as it actually existed, cannot be ascertained without *taking the utterance as a whole* and composing the successive elements and their mutual relations. To look at a part alone would be to obtain a false notion of the thought . . . the great possibilities of error in trusting to recollection—testimony of oral utterances, supposed to have been heard, have never been ignored . . . Entirety of parts is thus as essential as verbal precision; for the greatest possibilities of error lie in trusting to a fragment of an utterance without knowing what the remainder was." *Evidence* (3rd ed. 1940), Vol. 7, Section 2094, pp. 476-477, (Emhasis in original.)

The evidence which comes closest to meeting these standards is the Matsuoka notes and petitioner's report to Judge Wiig. Each corroborates the other on the general subject matter and tenor of the speech. To avoid completely even the appearance of basis for the observation in the majority opinion below that petitioner's case rests upon a deft interweaving of her "versions of the testimony into the bar association's evidence pointing the other way" [R. 561], the analysis which follows rests upon the version reflected in the Matsuoka's notes. In

doing this we seek to take the evidence most strongly against petitioner.

But this is not to overlook a serious caveat arising from the origin of this evidence. Matsuoka originally took his notes in longhand preparatory to writing his news article. [R. 152, 153.] Those received in evidence [R. 573 ff] are not his original notes,[21] but a slightly "expanded" version typed up at the request of his editor after the news accounts of the speech had led to the "to-do" in Judge Wiig's court. [R. 159, 160, 153.] To some extent therefore, this evidence is a product of interpretation of the speech itself—interpretation necessarily resulting from the process of selection imposed on anyone who takes longhand notes of a speech as well as from the efforts of a layman to render the complex subject matter petitioner dealt with. And this interpretation was prepared in its present form at a time when the "to-do" in court made it advisable to have reporter's notes confirmatory of the news story—the notes came *post litem motam,* as it were. Given these limitations, inferences drawn from the notes which involve further interpretation as to meaning may well be unreliable.

The majority opinion below, in marked contrast to the dissent, evinces no search for reliable evidence of petitioner's remarks. Although it took cognizance of the existence of the Matsuoka notes [R. 561] and appended them to its opinion [R. 573 ff.], the majority appears to have relied on a newspaper account of the incident written by Matsuoka. [R. 560, 561.] A comparison of the

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[21]These he gave to representatives of the F.B.I. [R. 154, 155.] In response to petitioner's strenuous efforts to have them produced [R. 157, 174] it was reported at the hearing that the F.B.I. did not have them. [R. 289, 290.] Nor did the newspaper editor have them. [R. 289.]

less on their face and demonstrably innocent in context have been inflated into offensive conduct. By this means the offense of bringing the courts into public disrespect has

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rights; *In re Troy*, 43 R. I. 279, 111 Atl. 723, the attorney made a speech during a Democratic campaign rally in which he asserted that judgeships on the Supreme Court of the state are "a matter of barter" and "are bought and sold" and asking "who paid money, how much was paid and who got the money at the election of the last Supreme Court judge"; *State Board v. Spriggs*, 61 Wyo. 70, 155 P. 2d 285, in an election pamphlet an attorney spoke of the "horrible and unbelievable breakdown of justice in the Supreme Court," conduct on the part of judges that "drives justice from its own temple to the habitations of bias, prejudice, failure and incompetency" and charged the judges with incompetency and corruption; *In re Bevans*, 225 App. Div. 427, 233 N. Y. Supp. 439, in a complaint filed in an action the attorney included allegations that judges and others had engaged in an illegal combine to commit crimes, protect criminals and ruin those who opposed them; *Lewis County Bar Association v. Willis*, 95 Wash. 251, 163 Pac. 737, the attorney issued a pamphlet entitled "The Crimes and Misdemeanors of Hon. Alonzo E. Rice." This pamphlet charged Judge Rice with grand and petit larceny, malfeasance and graft, adding that his court was a school for scandal. The pamphlet charged the judge with many specific crimes and wrongful acts; *In re Egan*, 24 S. D. 301, 123 N. W. 478, the attorney through newspaper articles repeatedly charged corruption on the part of the Supreme Court and the use of political influence with its members; *In re Thatcher*, 80 Ohio 492, 89 N. E. 39, the attorney in a series of newspaper articles charged the judge with bias against plaintiffs and in favor of corporations in personal injury cases, with collusion with the employer attorneys in labor cases, with capricious judicial action in cases decided by him and with taking unlawful salary; *Cobb v. United States* (9 Cir.), 172 Fed. 641, the attorney in a letter to the press said that the court had acted in the interest of the "gang whose sinister influence has paralyzed" the judge "for the past two years"; *United States v. Green* (C. C., Colo.), 85 Fed. 857, in an appellate brief the attorney uttered a "false, scandalous and malicious libel upon two of the presiding judges." In the brief this libel attacked their integrity although the precise language is not reported; *Thatcher v. United States* (6 Cir.), 212 Fed. 801, this case rests on the same facts as *In re Thatcher, supra*; *In re Richeson*, 64 Ariz. 85, 166 P. 2d 583, the attorney in papers filed in a case attacked the honesty, integrity and motives of individual members of the bar and made "groundless charges . . . against the judges of the Federal courts," apparently attacking their integrity although the precise language is not given in the report. The court found that the conduct indicated "mental instability and lack of moral values"; *Bar Association v. Philbrook*, 35 Cal. App. 460, 170 Pac. 440, an attorney in an affidavit filed in a pending action used

news story with the notes shows that in the former the reporter had, naturally enough, selected material, highlighted certain aspects and quoted the litigated remarks out of context. Aside from the fact that the article as such is hearsay, as interpretation rather than straight reporting it fails to measure up to the standard formulated by Wigmore. It is to be noted that there is no testimony that the news story truly sets forth petitioner's speech. [R. 148.]

By a curious inversion of what we understand to be the usual reasoning processes in these matters, the majority quotes the news story because the "findings of both the [Legal Ethics] committee and the [Territorial] Supreme Court implicitly sustain the accuracy of the published item." We had thought that, in the normal course, findings and judgments were sustained because supported by evidence of a substantial character—not because they sustain the evidence. Moreover, in cases of this kind where the standard of proof is clear and convincing (see *infra*) we had thought that "implicit" support is not enough, that the evidence had to be clear, direct, free from doubt.

The majority opinion, again in marked contrast to the dissent, makes no examination of the speech as a whole, no appraisal of the critical passages in their context. The findings of the majority below, as those of the Territorial Court, rest upon isolated sections only. This process of isolation accompanied with a glossing of the evidence serves to give a meaning and thrust to the critical remarks which the evidence does not support.

In our statement of the case, *ante*, we have summarized Matsuoka's notes and have italicized verbatim the portion bearing on the findings so as readily to give their con-

text. The words in capital letters indicate the objects of petitioner's criticism. Proper contextual appraisal of the critical remarks requires, we suggest, *first* the ascertainment of the general burden or direction of the speech as a whole, and *second*, the immediate setting of the critical remarks themselves. We address ourselves to the first approach. At the outset we say, notwithstanding the observation of the majority below [R. 561, 562] that the speech did indeed refer to the *Fujimoto* trial before Judge Wiig. It was critical of that trial in many respects, most of which were applicable not only to that trial but to any Smith Act trial, whether, as one witness put it "in Honolulu, New York or whatever." [R. 167.] Petitioner's main points were that the trial was essentially a thought control or book reading trial (see summary items 3, 11, 18, 19, 20), that as a conspiracy trial it was unjust because it was predicated upon an agreement to do something, not the doing of it (items 4, 7, 11) and because it permitted great latitude in the admission of prejudicial and remote evidence (items 6, 8, 9, 11, 15, 17), that the government's pre-trial propaganda and methods of recruiting witnesses make a fair trial impossible. (Items 7, 9, 10, 12, 13.) A review of the words in capitals show that she was speaking of "men in power" (item 3), "government" (items 4, 7, 10, 11, 12, 17), "F.B.I. agents" (items 5, 13), government witnesses Crouch and Johnson (items 6, 8, 11, 15), "they" (items 9, 16). In all of this there is no specific mention of Judge Wiig or the District Court. Once there is a reference to a "federal judge" who admitted Crouch's testimony of events 27 years old in comparison to the exclusion of such remote hearsay in prosecutions for substantive offenses as in the *Palakiko-Majors* case. (See item 15.) But this reference casts no reflection on Judge Wiig or his court and is blameless.

We turn now to an examination of the critical remarks in their textual setting. They are quoted here in the language of the court below. [R. 561.]

(1) "That horrible and shocking things were going on at the current Smith Act trial in Honolulu." According to the Matsuoka notes [R. 574] she said at the beginning of her speech that she "wanted to tell about some rather horrible and shocking things that go on at the trial." This is obviously an introductory remark by way of preface to the speech as a whole.[22] It takes on meaning only from all that followed it. That which followed attributed no horrible and shocking thing to Judge Wiig. The specifics charged in the balance of the speech are laid at the door of government agents (their tactics of prosecution, their methods of recruiting witnesses, their "propaganda," their use of obviously unreliable witnesses) and upon the Smith Act as a weapon of thought control. In her criticism that the conspiracy theory was being abused, petitioner had persuasive and learned company.[23] Her attack upon the unreliability of govermnent informers such as Crouch, was but part of a rising chorus which finally culminated in drastic action by this Court to pre-

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[22]Note the testimony of Andrade ". . . she said she would like to tell the audience of the horrible and shocking things that went on in the Smith Act trial in Honolulu. *and she also gave several illustrations*, but . . . I cannot remember them. . . ." [R. 180, 181; emphasis added.] Also Mrs. Morse: ". . . she gave various examples of things that I don't recall that were going on, in what she called the horrifying, shocking trial." [R. 185.]

[23]See Chief Justice Taft and the Senior Circuit Judges, Annual Report of the Attorney General, 1925, pp. 5-6; Justice Jackson concurring in *Krulewitch v. United States*, 336 U. S. 440, 453; Judge Learned Hand in *United States v. Falcone* (2 Cir.), 109 F. 2d 579, 581. See also Lasky, *The Long Bow of Lucretius, Book IV*, Line 817, 43 Cal. L. Rev. 596.

serve the purity of the judicial process.[24] To paraphrase to a lay audience these two abuses as "horrible and shocking" would not be a distortion of the judicial comment just referred to. And, let it be remembered, neither these nor any other comment in petitioner's speech attacked the integrity of Judge Wiig.

(2) "That the trial was not a fair one." [R. 561.][25]

(3) "That 'they' just made up the rules as 'they' went along." [R. 561.][26]

We treat with these together because in the evidence they are successive sentences. According to the notes, petitioner at one point said "there's no such thing as *a* fair trial in *a* Smith Act case." [R. 577; emphasis added.] This is immediately followed by "all rules of evidence have to be scrapped or the government can't make a case." [R. 577.] The context of these two sentences indicates that the first followed comments that "they" use unreliable testimony because "they will do anything and everything to convict" [R. 576; our item 9], that the government has witnesses "say things in order to convict" [R. 576; our item 10], that such evidence as the Johnson testimony was remote and used

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[24]Claims that this witness had a long history of perjured testimony in Smith Act and related prosecutions went unchallenged by the Government, in *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115, 121, 124. For another instance of the use of an obviously unreliable witness in a Smith Act case see *Mesarosh v. United States*, 352 U. S. 1; *Flynn v. United States*, 130 Fed. Supp. 413. Compare *Jencks v. United States*, 353 U. S. 657.

[25]Petitioner told Judge Wiig that she had said "there is no such thing as a fair trial in a Smith Act case"; that she had explained this on the basis of books and ideas being on trial and the hysteria created by Government propaganda. [R. 578, 579.]

[26]Petitioner unequivocally denied having made this statement. [R. 582.]

much as comment upon his conduct.[33] The gist of petitioner's speech was a criticism of the *Fujimoto* trial because it was a thought control trial; because as a conspiracy trial it was aimed at a claimed agreement to do a thing, not the doing of it, and it permitted too broad a scope for the admission of evidence; and because Government propaganda before trial and its methods of recruiting and using witnesses made a fair trial impossible. These comments touched upon matters which also became the subject of general notice,[34] as well as judicial examination.[35] In contrast to the cited cases, then, we deal here with discussion on a generalized plane and with no thrust at the trial judge.

It is in this context that the importance of discussion while the case is pending can be properly assessed. Pending cases, as the *Fujimoto* case, often present questions of broad concern dealing with the wisdom and effectiveness of existing law, the practices of law enforcement agencies and the administration of law and justice. It is a truism that discussion of these matters is likely to reach a wider and more responsive audience while the case is actually going on. *Bridges*, 314 U. S. at 268-270; *Pennekamp*, 326 U. S. at 346. Those best fitted to contribute

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[33]Save of course for the wholly blameless reference to the ruling by "a federal judge" who admitted evidence of third party declarations in the *Fujimoto* conspiracy trial as contrasted with the exclusion of such evidence in some other non-conspiracy case.

[34]See, *e.g.* 62 Harvard L. Rev. 276 (1948), The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants.

[35]*Communist Party v. SACB*, 351 U. S. 115; *Masarosh v. United States*, 352 U. S. 1; *Jencks v. United States*, 353 U. S. 657.

merely as a handle to introduce a number of books [R. 576; our item 11], that the government has carried on a propaganda barrage so that hysteria about communism infects the jury [R. 576; our item 12], that the F.B.I. pressures people to testify as it wants. [R. 577; our item 13.] It is this context that gives meaning to the statement that "there is no such thing as a fair trial in a Smith Act case." And this involves no charge at all against the integrity of Judge Wiig.

The last quoted sentence was followed by the one referring to the scrapping of evidence. The evidence has this remark as "all rules of evidence have to be scrapped or the government can't make a case."[27] [R. 577.] The court below made no finding that this remark was made, and it may be that the omission was intended as a finding that it was not made. [See R. 561.] The Territorial Court made a finding that petitioner said that "all rules of evidence *were being* scrapped so the government could make its case." [R. 117; emphasis added.] This version distorts the evidence so as to make the remark apply only to the *Fujimoto* trial and to give it a thrust as an act to aid the government. But in its true wording and in context it is plainly a comment on Smith Act trials generally, including, of course, the one in Honolulu. In the very preceding sentence she spoke of the lack of "a fair trial in *a* Smith Act case." The sentence is followed by a discussion of the difference in the rules of admissibility in trials for the substantive offense (*Palakiko-Majors* case) and for conspiracy. Later this is followed by a discussion of the latitude allowed by Judge Medina in an earlier case and the efforts by the Govern-

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[27] Petitioner unequivocally denied having made this statement. [R. 582.]

ment to go farther afield, "everything including the kitchen sink." [R. 577.] This finds an echo in an earlier part of the speech when petitioner criticized the admission of Crouch's testimony about "Russia in 1927," when "Fujimoto was four years old" and "Jack Hall was thirteen." [R. 575.] Plainly, this is a comment on the rules of evidence in conspiracy cases, not an attack upon Judge Wiig. It is true that in the passage discussing the *Palakiko-Majors* case appear the words "with the same situation a federal judge sitting on a federal bench permits Crouch to testify about 27 years ago." We read this as a report of something done at the trial, as an example of how the rules of evidence operate in conspiracy trials It may be critical of Judge Wiig's exercise of the discretion allowed him by the rules, but it does not charge him with wrongdoing or lack of integrity. It simply explains the results of the application of rules of law in the case at hand.

Shortly following the two sentences just analyzed there appear these, "there's no fair trial in the case. They just make up the rules as they go along." [R. 577.] These two sentences have the same context as those just reviewed. But these come between the passage discussing the *Palakiko-Majors* case and that discussing the experience in the trial before Judge Medina. This makes it clearer that petitioner's remark was addressed to the operation of the rules of evidence in conspiracy cases and the pressure by the Government to expand the scope of admissibility.

In these sentences the pronoun "they" has become all important. The majority below put quotes around it and this seems to have given it a gloss to include the trial judge. Such a construction is not supported by the evi-

to such discussion are lawyers, and the one of these most moved to present grievances and expound them thoroughly is a lawyer in the case. Plainly comment and debate in these areas may well, if not inevitably, include criticism, not simply of the law or the law enforcers, but also of the judge presiding over the pending case. Where the burden of the criticism is that the accused are being treated unfairly this may embrace either judicial conduct which is claimed to be erroneous or which is asserted to have produced an unfair result by virtue of its faithful adherence to established rules.[36] If the unfairness is claimed to have advantaged one side of the litigation the comment is susceptible of interpretation as charging partiality. But comments of this nature touch upon the very heart of judicial administration and they require public attention and understanding, the more so when the substance of the criticism is that in adhering to existing rules, the judge has brought about an unfair result. Moreover, the greater the notice which pending cases attract the greater the service performed by comment during the judicial proceedings. Such cases in themselves often raise issues of greater societal concern, and the public notice they receive gives assurance of more meaningful discussions of comment or criticism offered by the lawyer of record. It would appear, therefore, that discussion such as that involved here has a high degree of social importance. Furthermore, because such comment almost inevitably encompasses, directly or indirectly, the

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[36]This would seem especially true where, as here, much of what petitioner said was an attempt to put in layman's terms the contentions urged by motions and arguments to the trial judge. Thus the effect of government created hysteria had been presented in a motion for change of venue [R. 579], the abuse of conspiracy prosecutions and the consequent latitude in the admission of evidence in other briefs and memoranda. [R. 580, 582.]

dence. As the passage continues we find the nouns "attorneys," "Government." [R. 577.] Plainly the pronoun "they" in the sentence under examination refers to the attorneys—Government attorneys. It is familiar usage to refer to the prosecutors as the Government. Of the six witnesses who testified about a remark similar to this, four [Ferreira, R. 163; John D. Morse, R. 165; Andrade, R. 181; Phyllis Morse, R. 185] said petitioner spoke of the Government, and two [Matsuoka, R. 151; Olival, R. 171] used the pronoun "they." Andrade recalled the remark about "the Government—I mean, they" making up the rules in the same context with the reference to *Palakiko-Majors:* [R. 163.] The witness, John D. Morse, it will be recalled, said that petitioner said "there was not such a thing as a fair trial in a Smith Act case" and this "tied in with any Smith Act case, whether in Honolulu, New York or whatever it was." [R. 167.] Matsuoka said that "a portion" of the speech was "a general criticism as to the character of the criminal proceedings brought under the Smith Act." [R. 161.] In these lights to read "they" as referring to Judge Wiig violates not only good grammar but sound reasoning.

(4) "That unless the Smith Act trial at Honolulu was stopped in its tracks there would be a new crime—people will be charged with knowing what is included in books." [R. 561.] This is virtually a direct quotation from the notes [R. 577] which are the only evidence of this remark. It was made in the context of observations about another Smith Act trial and the dangers of thought control and censorship—the "new crime" obviously being reading books and speaking publicly. The remark on its face has no application to Judge Wiig and no evidence was offered to place such a gloss on it.

Whatever could have been meant by the remark about stopping the trial in its tracks, this could obviously have no reference to Judge Wiig. A fair reading of the statement would attribute to petitioner some such meaning as getting an acquittal by directed verdict or otherwise, or reversing the case on appeal[28] or in some other way resisting and defeating the Government's efforts to prosecute people under a law which petitioner regarded as unfair because it employed the dragnet of conspiracy and was predicated upon books and thoughts. In any event, the actual object of her remark was the threat of the "new crime" of reading books.

It is significant that petitioner recalled words similar to these. In her statement to Judge Wiig she said "I said that if Smith Act prosecutions continue, the only safe thing will be not to know how to read. And that Smith Act prosecutions, unless stopped, will lead to thought control. I said further that the Smith Act can be stopped here in Hawaii if enough people began to understand the danger of such prosecution." [R. 581, 582.] This statement was given two days after the speech at Honokaa and before Matsuoka's notes had been typed up. [R. 152.] It closely corroborates, and is closely corroborated by, the Matsuoka notes. From this it seems only fair to conclude that petitioner was seeking to promote the end of Smith Act prosecutions by spreading enlightenment as to what she conceived to be their dangers to the democratic process. In none of this can there be found the semblance of an attack upon Judge Wiig.

As respects the evidence as a whole, the nature of petitioner's subject matter and the consequent likelihood

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[28]The convictions were later reversed (*Fujimoto v. United States* (9 Cir.), 251 F. 2d 342) upon authority of this Court's decision in *Yates v. United States*, 354 U. S. 298. Petitioner was counsel of record on the appeal.

without casting any reflection upon the court or Judge Wiig. Indeed the remark is consistent with the premise that Judge Wiig is a fair and honorable man who follows the law but that the law itself produces a result which is "horrible and shocking." In this sense the result directly flowed from Judge Wiig's full performance of his judicial responsibility. That she said "the trial was not a fair one" in and of itself is not an attack upon the court or judge conducting the trial. The unfairness of a trial may result from many things beyond the judge's control, such as the climate of opinion in the vicinage, the use of perjurious witnesses by the prosecutor or the misconduct of counsel or witnesses in the courtroom. If the remark about making up the rules as "they" go along be read as referring to the judge, it is not an attack on his integrity. It simply means that he is not following the law. Lawyers often speak that way of trial judges, and they mean to connote erroneous, not dishonest, judicial action. The remark about stopping the trial has no thrust against Judge Wiig. There was not even supporting evidence to permit such an interpretation of it.

Arbitrary fact finding based upon no evidence or drawing inferences that the law or good sense and experience forbid, offends due process. There must be evidence that "rationally justifies" the findings. *Schware v. Board of Bar Examiners,* 353 U. S. 232, 239, 247; *Konigsberg v. State Bar,* 353 U. S. 252, 273; *Wieman v. Updegraf,* 344 U. S. 183, 191, 192; *Slochower v. Board of Education,* 350 U. S. 551. See also *Morrisette v. United States,* 342 U. S. 246; *Maggio v. Zeitz,* 333 U. S. 56; *Mortensen v. United States,* 322 U. S. 369.

The court below failed to discharge the responsibility cast upon it by the applicable principles of appellate review. Because of the free speech problems here the

judge is corruptly or politically motivated.[32]

Plainly petitioner's statement as shown in the evidence do not meet these criteria. Statements which are blame-

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pitiable, and that it was not supported in fact or in law; *Duke v. Committee on Grievances* (C. A., D. C.), 82 F. 2d 890, the attorney filed with the appellate court a motion charging that the trial court had filed a false bill of exceptions, that this had been done "intentionally and deliberately," and after the appellate court had refused to correct the bill of exceptions and after disciplinary proceedings had been started against him, the attorney said that the appellate court was as badly involved in falsifying the bill of exceptions as the trial judge, adding that the matter involved questions of the judicial integrity and common honesty of six federal judges; *In re Chopak* (D. C., N. Y.), 66 Fed. Supp. 265, during the pendency of the case the attorney wrote the judge accusing him of acting "despotically" and of deliberately taking advantage of his office to rule with "passion and vehemence." He also wrote his client saying that the judge was prejudiced against the client because the latter was a Negro; *In re Graves*, 64 Cal. App. 176, 221 Pac. 411, the attorney issued a public circular accusing the judge of using the "slightest flaw" to set aside a judgment against a railroad and of misusing his office so as to pry into the secrets of the juries' deliberations; *Morrison v. Snow*, 26 Utah 247, 72 Pac. 924, and *In re Snow*, 27 Utah 265, 75 Pac. 741, these are related cases. In the former the attorney filed an answer to a complaint in a civil case alleging that the judge conspired with the plaintiff to bring the suit and used the weight of his judicial position to that end, and that the suit had been brought to satisfy the malicious instincts of the judge so that the fruits of it should be divided between the judge and the plaintiff. In the second case he was suspended after a hearing for having filed such a pleading; *In re Dunn*, 85 Nebr. 606, 124 N. W. 120, in a petition for rehearing the attorney attacked the judge who wrote the Supreme Court's opinion, accusing him of "rank incompetence," of not knowing the plaintiff's complaint, of using reasoning that "reduces the law to a farce," of misstating the evidence, of ignoring the evidence supporting the defendant's position, and of dispensing with the evidence so as to base his conclusions on mere conjecture; *State v. Kirby*, 36 S. D. 188, 154 N. W. 284, the attorney issued a statement to the press saying that the Supreme Court would not disbar another lawyer whose disciplinary case was then pending, because that lawyer planned to run for public office and the Supreme Court and the Governor of the state did not want that lawyer to use a decision of the Supreme Court in a third case for political purposes in a forthcoming campaign.

[32]*State Bar Commission v. Sullivan*, 35 Okla. 745, 131 Pac. 703, the attorney caused to be printed and published a pamphlet entitled "A Criminal Combine," in which he accused a judge of participating in a criminal combination to deprive the attorney of his

been expanded to the point that it is without contour and dimension. Construed and applied as here it becomes a trap for the unwary, a dragnet operating by no known or

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the following language in referring to judges of the court: "criminal, corrupt and wicked conspiracy," "calculated brutality," "corrupt deadfall"; *In re Rogers*, 28 N. M. 375, 212 Pac. 1034, the attorney wrote a letter to the judge saying that if ten per cent of the reports about him were true, he was a "blockhead" and the "most corrupt man . . . ever elevated to judicial position"; *In re Robinson*, 48 Wash. 153, 92 Pac. 929, in petition for rehearing to Supreme Court, the attorney stated that it had been rumored how the Court would vote in the case, that the estate involved therein would go one-half to the political ring under whose influence the members of the court were appointed, that the head of this ring could control federal patronage and had already decided to appoint members to federal courts in the area, and that it was the duty of the court to hear the appeal on its merits in order to wipe out these rumors; *In re Philbrook*, 105 Cal. 471, 38 Pac. 884, attorney filed brief with Supreme Court of state charging that one of the justices thereof, while a practicing lawyer, had participated in the preparation of a settlement agreement disposing of many issues of the case and that this agreement, if not set aside, would cause people to know that the court was corrupt. The attorney also charged that a conspiracy existed to have that agreement approved because of the power of the justice referred to and the attorney referred to him as "corrupt," "wicked" and "*particeps criminis*"; *People v. Green*, 9 Colo. 506, 13 Pac. 514, the attorney alleged in pleadings that the judge had accepted a bribe for rendering an unwarranted judgment and that he and the bribing attorney had induced a witness before the grand jury to commit perjury; *In re Mains*, 121 Mich. 603, 80 N. W. 714, the attorney in an affidavit charged the judge with "outrageous, persistent, continued illegal and unlawful rulings," with accepting bribes, with cooperating with attorneys in a "diabolical plot" which was "a malicious, vindictive, corrupt concoction" to place that attorney's client under arrest and get control of his witnesses; *United States v. Markewich* (D. C., N. Y.), 261 Fed. 537, attorney in public speech following decision by court on discontinuance of a street car line, said that the people have been discriminated against, the traction interest has supreme control of the court and everybody else, the decision was not honestly rendered, that recall would be too mild a remedy and the correct remedy should be the noose or impeachment; *Matter of Knight*, 264 App. Div. 106, 34 N. Y. S. 2d 810, attorney accused various judges who had sat on various issues arising out of complex estate litigation of being "incompetent," "mendacious," "grossly dishonest"; *Kentucky State Bar Assn. v. Lewis*, (Ky.), 282 S. W. 2d 321, attorneys connected with taxpayers' litigation published advertisement and filed affidavit charging corrupt arrangement between presiding judge and political bosses to prevent another judge from sitting on the cases.

ascertainable standards. The "fearless, vigorous and effective" advocacy (*Offutt v. United States,* 348 U. S. 11, 13) which the character of our institutions requires for the protection of individual rights can not flourish under the concept of gross misconduct applied here. It is the duty of the lawyer to stand between his client and the court and, when the facts justify it, to resist and criticize the judge himself. *Gallagher v. Municipal Court,* 31 Cal. 2d 784, 795, 796, 192 P. 2d 905. This, we submit, would include advising the court that the trial is unfair as well as that the court has fashioned rules, unsupported by authority, which advantage an opponent. No mind can so compartmentalize itself that it can utter freely and fearlessly in court things which, when uttered beyond the court's threshold, endanger his professional license. In this area there is no real dividing line. If criticism of the conduct of a trial can lead to discipline because it "tended to . . . create disrespect for the courts" [R. 118] so also could such criticism in the courtroom itself. The public confidence in the fair administration of justice cannot dispense with the lawyer's criticism in either forum.

But the evidence here compels the conclusion that the criticism for which petitioner was disciplined was not animadversions upon the judge but rather attack upon the Department of Justice and certain rules of law. We have already shown (*ante,* p. 34) that the objects of her comments were "men in power," "the government," the F.B.I., witnesses Crouch and Johnson, the abuse of the conspiracy theory especially in the admission of third-party declarations, the dangers of thought control. In its essence this is a sharp attack upon the practices of the Department of Justice made in the context of a pending trial. The pendency of the trial seems to have diverted the thinking below from the real object of petitioner's remarks to the

trial judge who was never mentioned. But the hard fact is that the criticism did relate to the Department. Not only is it a truism, as the dissenters below observe, that a lawyer may not "be disbarred for an attack upon the Department of Justice" [R. 604]; to stifle such criticism would so hobble the Department's adversaries as to deprive the administration of justice of two essential ingredients, free criticism and fearless advocacy.

POINT TWO.

The Decision Below Is a Grave Infringement Upon Freedom of Speech in an Area of Great Public Concern, and by a Speaker Peculiarly Fitted to Contribute to Public Understanding.

Had the Honokaa speech been given by a non-lawyer there would be no question as to its constitutional protection. *Bridges v. California,* 314 U. S. 252; *Pennekamp v. Florida,* 328 U. S. 331; *Craig v. Harney,* 331 U. S. 367. Central to the determination below were the facts that (1) the speech was given during the pendency of a trial, (2) by a lawyer of record therein. Neither of these facts should deprive petitioner of her constitutional protection for the speech she actually gave.

1. The cited cases furnish valuable guidance on the importance of public comment during pendency of the case. In those cases there was open public attack upon the judge, either by name or unmistakable reference, in words of strong denunciation or weighty threat. Here the trial judge was not mentioned by name, and it requires a laborious construction to read into the evidence even so

conduct of the trial judge, a nice discrimination between fair comment and attack upon integrity is required.

2. The court below took the view that participation in this area of public discussion is forbidden the lawyer of record *while the case is pending.* During that period, it held, "the only proper forum for the lawyer to vindicate his clients" is the courtroom. ". . . the judicial process is entitled to protection from those who get their license from a judicial temple . . ." [R. 562.] Laymen like Bridges and the Times-Mirror, it was said, are in a different category for they were not "court officers charged with the duty of keeping the temple clean." [R. 562.]

But this misconceives the nature and purposes of public discussion. The lawyer who comments publicly on the case in which he is engaged, as did petitioner here, seeks not to vindicate a client but to alert the public to what in his informed judgment is a serious problem, perhaps a public danger. Right or wrong, he affords the court no "protection" by silence. He discharges no "duty of keeping the temple clean" by withholding criticism. Neither the tabernacle of justice nor the householder's floor are cleansed by sweeping things under the rug. Surely a lawyer is free to tell the public that which he has already urged to the court itself, as did petitioner here. Silence on the part of counsel of record at the time the trial is under way may well result in no effective discussion of his grievances. The key concern of a free society is prompt and meaningful discussion of all issues affecting all branches of government without exception.

Additionally, there is nothing in the lawyer's license that renders him a built-in apologist for the *status quo* in the judicial branch. He owes no duty by silence or

utterance to afford "protection" to a judicial process that, through any means, results in unfairness or the appearance of it. The term "officer of the court" does not have a literal meaning (*Cammer v. United States*, 350 U. S. 399), and it surely does not conscript counsel of record to the task of by silence creating the appearance of justice to mask injustice or what in his informed judgment seems to be injustice.[37]

3. This is not to say that there are no limits to the lawyer's freedom of comment on pending cases. One is that indicated in *Bridges, Pennekamp* and *Craig, supra.* As with other citizens, he may not engage in utterances that create an "extremely high" risk of interfering with "fair judicial administration." This Court has wisely not attempted to draw any more specifically the line that sets apart the impermissible in this area. Nor need it in this case. The utterances charged against petitioner fall far short of the expressions given constitutional protection in the cited cases.

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[37]Implicit in the lower court's reasoning is a concept of loyalty owed by lawyers toward the courts as if they were employees or subordinates of the latter. This concept found expression in a recent address by the president of the American Bar Association: ". . . lawyers are officers of the court, and some of the same considerations which demand loyalty of subordinate officers in the military service, demand understanding and loyalty on the part of the bar, if the rule of law, administered by the courts, is to be sustained in the Nation." (*Los Angeles Daily Journal*, January 23, 1959, p. 1, col. 8.) It would be difficult to articulate a concept more destructive of professional independence and the advocacy expected of the bar, especially in the defense of individual dignity. See *Offutt v. United States, supra; Konigsberg v. State Bar*, 353 U. S. 252, 273; *Gallagher v. Municipal Court, supra.*

Another limitation is one growing out of the lawyer's position as such. His intimate relation to the court and the judicial process has been said to require that he not engage in comment that brings the courts into disrespect. But here there operates a strict test designed to protect both freedom of speech and the independence of the profession; to merit discipline the utterances must have an enormity that is not consistent with the ability of the court to maintain public respect. This concept has already been developed. (Point One, *ante.*) Suffice it here to state that the speech condemned by this test is that which (a) threatens the person or reputation of the judge or (b) charges that the judge or court has knowingly misused its powers in a particular case or (c) asserts that the judicial officer is corrupt. No such utterances are involved here.

These limitations, we submit, apply to lawyers whether they comment on pending matters in which they are of record or otherwise. The crucial fact is not their connection with the pending case but what, *as lawyers,* they say. The cases predicate the limitations here noted upon the lawyer's relation to the court, not to the case.

There remains the question whether other limitations operate upon the lawyer of record while the case is pending. Diligent research has disclosed no decision and no textual comment which, in American law, imposes any greater limitation upon such a lawyer than upon lawyers generally. So far as our inquiries show, the duty to maintain the respect owing the courts falls evenly upon lawyers of record and all other members of the profes-

sion. There would seem to be laid down in the authorities no other restraint upon a lawyer's public comment which has relevance here.[38]

4. The court below not only ignored these criteria, it rejected the clear and present danger test. [R. 563.] Since *Schenk v. United States,* 249 U. S. 47, the test of governmental power to limit speech has been whether its words and circumstantial context are such as to create a clear and present danger of bringing about a substantive evil within the power of Government to prevent. This

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[38]We are not unmindful of Canon 20. (A. B. A., Opinions of Committee on Professional Ethics and Grievances, 1957, p. 15.) This rule applies to the releasing to news media of facts or charges or opinions relating to the issues on trial or about to be tried. (See Opinion No. 199, Op. cit., p. 400 ff.) The objective of the canon would seem to be the release of information "intended or calculated to influence the decision in a pending case in which the writer is counsel." [Decision No. 256, op. cit., p. 641.] This view is reinforced by the comments of those who have studied proposals to revise Canon 20. Trumbull, *Materials on the Lawyer's Professional Responsibility,* 1957, pp. 196-200 esp. pp. 198, 199. While the conduct there covered is most usually adulged in by lawyers who are of record, it can also be the work of any other lawyer, or laymen.

This rule has no application here. Its purpose, obviously is to protect the fair administration of justice; it seeks to insulate the judicial scales from any influence not properly a part of the adjudicatory process. It cannot be seriously urged that petitioner's remarks created any such risk. Her subject matter, as shown in the Matsuoka notes, delivered to a group largely made up of union members already partisan to the defense in Fujimoto, given in a town of some 1000 souls over 180 miles across open sea from the seat of trial, and at a time long after the jury had been selected and, we may presume appropriately instructed to lay aside news reports about the case, could not possibly interfere with the process of adjudication in the *Fujimoto* case.

Finally, and doubtless controlling here, the trial committee, whose report framed the issues before the Territorial Court, found petitioner's speech to have been a violation of Canon 1 [R. 16]; this is the offense of failing to maintain the respect owing the courts. (Op. cit., p. 1.) Such also was the finding of the Territorial Court [R. 118] and it was this finding that the court below sustained. [R. 559, 570.]

test has been specifically applied to utterances concerning courts and matters pending before them with the express admonition that the evil must be "extremely serious" and the "degree of imminence extremely high" before the utterance can be punished. *Bridges v. California,* 314 U. S. at 263. While the clear and present danger test is not a formulary that substitutes for analysis, it does offer a method of evaluation that employs objective criteria reasonably referrable to legitimate ends of government. In rejecting this test the court below employed no comparable criteria. It particularized no evil to be avoided, no objective of public interest to be attained. It failed to examine the relationship, causal, logical or spatial, between the utterances in question and any legitimate concern of the state. It delineated no concern with free discussion to be balanced against objectives of government. The speech here was held to merit the drastic consequences visited upon petitioner because, for reasons not stated, it went beyond the undefined "restraints" said to be "applicable" to counsel of record while not "applicable to the public in general." These "restraints" were not specified, nor was their relationship to the aims of government defined or the circumstances giving rise to their operation. As has already been noted the authorities seem to impose no "restraints" other than those related to protecting the fair administration of justice and the public respect of the courts.[39] In this state of the law

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[39]We do not contend that in an appropriate case other limitations may not be found to outweigh the importance of public discussion. We do urge that this is not such a case and that any attempt here to fashion such other limitations here would be an attempt to formulate "a rule of constitutional law broader than is required by the precise facts of the situation." Mr. Justice Frankfurter concurring in *United States v. C. I. O.*, 335 U. S. 106, 126, 127; see also *Rescue Army v. Municipal Court,* 331 U. S. 549, *Federation of Labor v. McAdory,* 325 U. S. 450.

the undefined "restraints" invoked by the court below seem either to forbid all public comment concerning a pending case by the lawyer of record or, by the very ambiguity of language, to fashion a weapon of pervasive censorship.

Beyond such protean standards as those already indicated, the court below rested its judgment upon the observation that "the comment was unseemly and certainly at the wrong time" [R. 565] and the rather Delphic statement that the term "officer of the court" has "vitality and is not a transparent euphemism." [R. 566.]

The criterion of "unseemly" has no content and imports largely subjective values which vary with the personality of the listener. It is therefore censorial. *Thomas v. Collins,* 323 U. S. 516, 534; *Herndon v. Lowry,* 301 U. S. 242, 262-264. In any event the good taste or seemliness of the speaker is not the measure of his right to speak. *Cantwell v. Connecticut,* 310 U. S. 296, 310; *Craig v. Harney,* 331 U. S. at 376. Speech which stirs people to anger, invites dispute or brings about conditions of unrest is protected. *Terminiello v. Chicago,* 337 U. S. 1, 5. That petitioner was an "officer of the court" would appear irrelevant to her freedom to comment upon proceedings occurring there. This concept seems to import a relationship of subordination and consequent loyalty (already adverted to, see *ante,* p. 54) which is wholly incompatible with an independent bar. The standards set by the court below, then, are utterly inconsistent with the First Amendment which this Court has said "must be taken as a command of the broadest scope that explicit language which, read in the context of a liberty-loving society, would allow." *Bridges v. California, supra,* at p. 263.

Resolution of the issues posed by the judgment below on the Honokaa speech calls for balancing the interest of public respect and confidence in the courts against that of free public discussion by the lawyer of record in a pending trial. On the facts of record we submit the balance favors petitioner's speech. This was a generalized discussion of what petitioner saw as evils in enforcement of the Smith Act. She presented informed comment on public issues of current importance. These were not fancied grievances. So far as they dealt with abuses of the conspiracy theory they echoed and relied upon the troubled reflections of the bench and bar over many years, and in respect of the use of perjurious witnesses they posed a problem that finally reached this Court.[40] There was no direct attack upon or criticism of Judge Wiig, and the finding that there was rests upon "implication" from the fact that petitioner spoke of a pending trial over which Judge Wiig presided. These implications further rest upon laymen's rendering of a lawyer's attempted vulgarization of technical legal concepts and a strained gloss of words, such as the pronoun "they" in an account which is at best elliptical note-taking never intended to be verbatim.

All that petitioner said, at least in respect of the abuse of the "sprawling" conspiracy "strategy," the "loose application of rules of evidence,"[41] the unfavorable trial climate created by government propaganda, and the perils of thought control, she had already urged orally and in writing to the court's face during the very pending case in question. The speech was given to an audience made up

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[40]See *ante* p. 51, n. 35.

[41]The quoted words are from Mr. Justice Jackson concurring in *Krulewitch v. United States,* 336 U. S. 440, 453.

largely of contributors to the defense in a hamlet located over 180 miles from the courthouse, and the record shows no effort on her part to publicize her remarks. Petitioner at the time was a lawyer of some 16 years standing, whose record was unblemished by misconduct and distinguished by the quality of her advocacy. No intent to show disrespect to the courts is fairly inferable from the surrounding circumstances and no calculation to this end appears from the words used. It does not seem likely that a lawyer of this stature, bearing the heavy responsibility of defending clients in so difficult a situation would purposefully attack in a public meeting the trial judge before whom she daily carried on her duties.

The evidence of what was said and the circumstance of its utterance thus lacks the solidity "required to outweigh the underlying importance of First Amendment liberties. See *Pennekamp v. Florida*, 328 U. S. at 347, 348, and cases there cited.

It is difficult to isolate from this record any real or substantial governmental interest that has been affected. That Judge Wiig as an individual evinced some sense of personal hurt or involvement [R. 583, 584] is no measure. Here we deal with an institution not an individual; subjective reactions are too variable a test. In the fair administration of justice cases this Court assumed a judge "of fortitude, able to thrive in a hardy climate." *Craig v. Harney*, 331 U. S. at 376; see also *Pennekamp v. Florida*, 328 U. S. at 349; *Bridges v. California*, 314 U. S. at 273, 278. Where, as here, the public interest is public respect for the courts, it may be assumed that the individual judge has a hardy self-esteem and the public a willingness to weigh all comments on its institutions rather than be led off by any single utterance. (Compare

Pennekamp v. Florida, supra, at 349.) Otherwise adjudication would be misled by fine-drawn theories and speculations dealing with subjective reactions and suppositious thought processes. The very possibility of these factors would negative immediacy of danger to the public respect for the judiciary. Nothing appears in the record to show that the asserted loss of public respect did or could rationally flow immediately from the utterances in question. In this connection it is appropriate to observe that it is inherent in our institutions that the public be able to hear and consider comments on judges and their work which, directly or indirectly, had to consider their worth as public servants and their right to continue in office.[42]

Having in mind the tenuity of the evidence as to the words used and their meaning, the substantial doubt as to their thrust against the judge, and the circumstances of their use, this record does not, on balance, make out a danger to public respect for the courts. Whatever danger can be raised from the record is speculative and remote, based on attenuated implications, and having neither the clearness nor the immediacy to warrant an embargo on permissible public comment.

The impact of such First Amendment standards as those employed below on professional independence is

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[42]This proposition underlies *Bridges, supra,* esp. at 270; *Pennekamp, supra,* esp. at 347; *Craig, supra,* esp. at 376, 377. See also Circuit Judge Soper in *In re Ades* (DC Md.), 6 Fed. Supp. 467, 481 ". . . An attorney does not surrender, in assuming the important place accorded to him in the administration of justice, his right as a citizen to criticize the decisions of the courts in a fair and respectful manner, and the independence of the bar, as well as of the judiciary, has always been encouraged by the courts." *In re Breen,* 30 Nev. 164, 181, 93 Pac. 997, 1002 "Any tribunal that can not tolerate free discussion and criticism of its decisions is justly entitled to contempt."

manifest. The lawyer is afforded no test whereby before he speaks he can measure his utterances against permissibility in terms of his professional position or the legitimate concerns of government. The criterion of "unseemly" indicated in the opinion below, especially when combined with the process of arbitrary inference indulged by both lower courts (see *ante*, Point One), would have the lawyer "at the mercy of the varied understanding of his hearers." *Thomas v. Collins, supra,* at 535. In these circumstances there is only one safe course—not to speak.

But not speak for how long? Until the last conceivable judicial act has been performed in the case? Not, let us say, from 1951 when the *Fujimoto* indictment was found until 1958, when it was dismissed? Or to speak, but ever so cautiously? Even the most considered criticism of the conduct of a trial that broached upon the nature and effect of rules of law applied therein would be open to some claim that it attacks the trial judge. At the very point where public discussion can perform a more valuable function it would be inhibited by vague and censorial standards. Just when public debate can be advantaged by the informed comment of the lawyer on matters within his special ken, it would be deprived of his contribution.

Of no less moment is the effect of these restraints upon the lawyer's court room advocacy. If a lawyer is to be disciplined for his criticism of rules of law and their application, the tactics of the prosecutor and other law enforcement agencies when these criticisms are made in public 180 miles from the seat of trial, he will be hesitant to say them to the judge's face. We have no place for a bar that is not free to tell a judge that he is not giving an accused a free trial or that his rulings advantage an opponent.

This Court has expressed concern for the independence of the bar, "that lawyers be unintimidated—free to think, speak and act as members of an Independent Bar." *Konigsberg v. State Bar*, 353 U. S. 252, 273. The lawyer's responsibility is not only to afford "fearless, vigorous and effective" advocacy (*Offutt v. United States*, 348 U. S. 11, 13) but also to serve as a tribune "to warn their fellows when liberty is threatened and to lead them in combating the danger." Editorial, *Liberty Under Law* (1953), 39 A. B. A. J. 692. They serve in the field of law and the administration of justice important functions of informing the people concerning criticism of the laws and the current proceedings in the courts.[43]

The holding below is directed away from this glorious tradition. It points in the direction of a subservient bar, "loyal to the court (or perhaps the occupant of the bench), obedient in the fashion of a subordinate officer, more concerned with the toleration of the bench than the vindication of clients. It is offensive to the very spirit of our institutions. It would leave individual liberty unable to choose a free defender.

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[43] *In re Hearings on Canon* 35 (Colo., 1956), 296 P. 2d 465, 470; Jessup, *The Professional Ideals of the Lawyer, A Study of Legal Ethics* (N. Y., 1925), p. 24

"The Traditional function of lawyers is that of servant to the whole people, guarding justice and expanding the areas of individual freedom. The judgment of history on the lawyers of our generation will be based on how adequately we have fulfilled this noble calling." William T. Gossett, General Counsel to Ford Motor Co., *Address to Michigan Judges Ass'n, Release of Ford News Bureau*, Sept. 5, 1952. "No one suggests that the American people should follow implicitly or blindly the leadership of their lawyers; but in the discussion of changes in the American form of government and in the purposes of American institutions and laws, the lawyers should do their part in the informed discussion of the great issues before the people." Judge William L. Ransom, former president of the American Bar Association, quoted by Hon. Nathaniel Goldstein, Attorney-General

POINT THREE.

In Holding That Petitioner's Post-Verdict Interview of the Juror, Fuller, Was Gross Misconduct the Court Below Established and Applied a Principle That Undermines the Ability of the Bar to Protect Clients and Courts From Tainted Judgments.

Petitioner interviewed, post verdict, a juror who had served in the *Fujimoto* case. This she did at the request of his sister and with the consent of his wife after having been told that the juror appeared to be ill and irrational and had made many statements to the effect that he had acted wrongly and that the case was a "frame-up." She inquired of him what had gone on in the jury room in an obvious effort to ascertain either (a) possible infirmity in the verdict by reason of this juror's imbalance during the trial or (b) the factual basis for the assertion of wrongdoing and frame-up. The language of the Ter-

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of the State of New York, 16 Albany L. Rev. 9 (1952). "The lawyer must not only understand the ways of democracy; he must live the ways of democracy; he must teach others and lead a nation in the ways of democracy." Hon. Robert G. Simmons, Chief Justice of the Supreme Court of Nebraska, 23 Neb. L. Rev. 75 (1944). "Our constitutional rights of free speech and of freedom of assembly make this opportunity for advocacy available to all. Advocacy is peculiarly available to the lawyer because of his special skills." Mr. Justice William O. Douglas, *The Lawyer and the Public Service*, 26 A. B. A. J. 633, 636 (1940). "There is no reason in the world people should not criticize the [Supreme] Court. I believe in criticizing the Court, Congress, even the Governor . . . I do not think there is any group in America outside the lawyers who can be expected to preserve the individual liberties about which people speak." Mr. Justice Hugo L. Black, *The Lawyer and Individual Freedom*, 21 Tenn. L. Rev. 461, 463, 469 (1950). See also, Myron C. Taylor, Letter to the Board of Trustees of Cornell University, 14 Cornell L. Q. 197, 198 (1929), quoted in Cheatham, *Cases and Materials on the Legal Profession* (1938), p. 398; Cooley, *Constitutional Limitations* (8th ed., 1927), vol. 1, p. 703, n. 3; Hon. Stanley H. Fuld, Associate Judge New York Court of Appeals, *The Lawyer—More Than Advocate*, 15 Albany L. Rev. 1 (1951); Justice William O. Douglas, *"Law in* Eruption," *A Concept of Lawyer's Duty in a Time of Change*, 34 A. B. A. J. 674 (1948).

The case is particularly apposite here. There, as here, the lawyer's conduct related to a case pending in the federal court. There, as here, whether the conduct was actionable at all turned peculiarly on this relationship in the context of the case and the effect thereon of the acts charged. The judgment in both cases has a far-reaching impact on the effectiveness and independence of the lawyer in the discharge of his responsibility to the court and its litigants. For all these reasons the restraint shown by New Jersey should have been emulated by the Territory. Because the disregard of these restraints may, as here, lead to serious interferences with the federal bar and the administration of justice in the federal courts, it is appropriate that this Court furnish guidance for both the federal and the local jurisdictions.

Conclusion.

Upon all of the grounds urged herein, separately and together, the judgments of the lower courts should be reversed and vacated.

Respectfully submitted,

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ritorial Court and its reliance upon *Rakes v. United States* (C. A. 4), 169 F. 2d 739 [R. 119, 120] make it plain that the mere interview and interrogation of the juror constitute the gravamen of the offense found.

This is a question for this Court to settle because petitioner's conduct occurred as counsel of record in a case in a federal court with respect to a juror who had served in that same court. This Court's supervisory powers are invoked both because the attorney's conduct occurred in a federal court and because the court below has enunciated a principle for all federal courts—at least those in the Ninth Circuit.[44] *McNab v. United States,* 318 U. S. 332, 340. The issue is whether a lawyer, a member of the bar of a District Court, while serving in a case pending in that court, commits gross misconduct by interviewing an excused trial juror in that case concerning matters related to the juror's possible mental illness and his asseverations of wrong-doing and frame-up. This problem relates both to the scope of a lawyer's freedom in the federal jurisdiction to investigate facts bearing upon his client's rights as well as the protection afforded the court where a cloud is cast upon its judgment. This is no local matter for the Territorial Court or the Territorial Bar. The conduct here occurred in a federal case in a federal court. The court below has held it was misconduct in the federal jurisdiction. In an earlier decision the court below reached a similar result (*Northern Pacific Railway v. Mely* (C. A. 9), 219 F. 2d 199) as did the Fourth Circuit in *Rakes, supra.*

The question calls for a nice balancing of weighty interests. In *Mely* and *Rakes* it was thought that the

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[44]This principle is also operative in the Fourth Circuit under *Rakes v. United States, supra.*

need for insulating trial jurors from "potential" outside influence arising from an awareness that they might be interrogated concerning the occurrences in the jury room, required the prohibition against interrogation by lawyers. On the other hand there is the public concern in obtaining honest, untainted verdicts by rational jurors. In this connection it has long been recognized that to foreclose all evidence, taken from the jurors' mouths, of influences upon the deliberations might well violate the "plainest principles of justice." *United States v. Reid,* 53 U. S. 361, 366. In that case and in *Mattox v. United States,* 146 U. S. 140, 148-150, this Court held that evidence of "overt acts" (as contrasted with "the personal consciousness" of the jurors, their thought processes) would be admissible to show improper influence upon the verdict. These cases recognize that the existence of "overt acts" is subject to proof and rebuttal by ordinary means of trial whereas matters pertaining to the juror's mental state are incapable of such proof except by the juror's word alone. It would seem that only in the latter case has the rule against permitting the juror's testimony to impeach his own verdict had its genesis and application. *Hyde v. United States,* 225 U. S. 347; *McDonald v. Pless,* 238 U. S. 264. Judge Learned Hand has cogently argued that the rubric against permitting the jurors to impeach their verdict forecloses valuable evidence and that the correct rule should be as here stated from the *Reid* and *Mattox* cases. *Jorgensen v. York Ice Machinery Corp.* (C. A. 2), 160 F. 2d 432. See also Wigmore, *Evidence,* 3d Ed., Sec. 2353; Compare *Clark v. United States,* 289 U. S. 1, 12, 13, 16, 18.

A brief analysis of the authorities upon which the court below relied as well as that on which the original bill of particulars amplifying complaint was predicated [R. 3, 5,

13], show their inappositeness here. They do not involve the same weighty interests on balance in this case. In *Rakes* a convicted defendant sought to overturn the verdict by jurors' affidavits to the effect that they had seriously doubted the defendant's guilt, apparently because they thought he did not understand the meaning of his acts; that had they known that the court would acquit his co-defendants they would not have agreed to the guilty verdict; and that they yielded to the arguments of other jurors. These matters involve neither wrongdoing nor mental incompetence. They are clearly evidence of the jurors' thought processes, their "personal consciousness" and therefore are controlled by the *Hyde* and *McDonald* cases, *supra*. The same may be said of the *Mely* case. The jurors' affidavits dealt only with the arguments of their fellow jurors, without hint of improper conduct or mental disorder.

The Bar Association's complaint cites Opinion 109 of the American Bar Association Committee on Professional Ethics. There the Committee dealt with an inquiry of an apparently youthful practitioner who had interrogated jurors "concerning how certain aspects of the case impressed them, what they thought of certain evidence . . . and how certain members of the jury stood on certain questions." *ABA, Opinions of the Committee on Prof. Ethics,* 1957, pp. 231, 232. Such conduct does not touch upon the issues here. It is noteworthy that the Committee, in disapproving the interrogation described, expressly refrained from condemning inquiry of the jurors "to prevent a miscarriage of justice" or "where a juror has been guilty of fraud." (Op. cit., p. 234.)

Surely facts relevant to a juror's wrong-doing and "frame-up" in a federal prosecution or his mental im-

balance while serving, might well have been admissible to overturn the *Fujimoto* verdict. That being so, petitioner was right in trying to find out what facts there were by interviewing the juror who spoke of these things. She could have done no less to discharge her responsibility to both the District Court and her clients who then faced long prison terms and heavy fines. Here, surely, the public interest in the purity of justice outweighs any other. It would indeed be a hollow rule ringed with irony that would make evidence of this kind admissible but hold the lawyer's investigation of suggestions of it to be misconduct. Nor is it practicable narrowly to circumscribe the lawyer's conduct by making its disciplinary consequences turn upon the admissibility of the facts his investigation discloses. If he acts upon facts sufficient to put a reasonable person on inquiry he should not be required to develop admissible evidence on pain of severe discipline. Any more severe test would inhibit the lawyer by fear of subsequent punishment and thus deprive the administration of justice of invaluable assistance.

But the rule of the court below makes any inquiry of jurors under any circumstances misconduct subject to severe sanctions. Interview of jurors in connection with matters which affect, in the words of this Court, "the plainest principles of justice" are absolutely interdicted equally with those which are inadmissible to affect the verdict. It places a crippling restraint upon a lawyer's performance of tasks essential to the protection of the individual and the court. It menaces the independence of the profession. To forbid the lawyer to act as did petitioner in the premises of this case is to amputate an arm of the court, to destroy a shield of the accused. This restraint operates in the federal courts until removed by this Court.

POINT FOUR.

The Judgment of the Territorial Court, Affirmed Below, Was Beyond Its Jurisdiction.

The Territorial Court imposed discipline on petitioner for her conduct in a matter pending in the federal court. As to the Honokaa speech, it was the gravamen of the charge as well as of the finding [see R. 116] that petitioner said the things specified while counsel of record in a case pending in the federal court and concerning the trial of that case. It was concluded that petitioner attacked the administration of justice in that court and impugned the intergrity of a judge of that court. Petitioner's conduct in the juror interview was manifestly in the course of her work as counsel of record in a case pending in that court and related to a juror and the probity of the verdict therein. In affirming the judgment on the Honokaa speech aspect of the case, the court below rested its decision largely, if not exclusively, on the proposition that petitioner's speech was made during the trial by one who was counsel of record. In all probability it rested its opinion concerning the juror interview on the reasoning of the *Rakes* and *Mely* cases, *supra*, which state the rule as one purposed to protect federal juries in federal courts.

In disciplining petitioner, the Territorial Court laid down standards of conduct for attorneys of the federal court engaged in cases before that court. This standard, as to petitioner's speech, is, in effect, that criticism of the manner in which a trial is carried on while the same is in progress is misconduct meriting discipline. Very narrow limits are thus set upon the area of allowable comment concerning pending matters by attorneys. They are far more confined than the bounds indicated in the

Bridges, Pennekamp and *Craig* cases, *supra,* as well as in those dealing with the offense of bringing the courts into disrespect. (See *ante,* pp. 45, 46, n. 30, 31, 32.)

As to the juror interview, the standard is that no lawyer will be permitted, after verdict, to interview any juror concerning any matter occurring in the jury room, no matter what its nature or effect. And this standard gravely encinctures the activities of lawyers in protecting both the temple of justice and the rights of their clients.

But the first issue here is not where the standards should be fixed, but which court should set them. For here we deal with members of the bar of the federal court engaged in matters before that court. To fashion a standard in these circumstances is intimately to affect the administration of justice in the federal court. As a naked proposition it would seem unassailable that the federal court should determine the rules of conduct for attorneys in matters before that court. The lawyer as advocate and officer of the court discharges important responsibilities in guiding and assisting the court in the dispensation of justice under law, in the protection of individual dignity and rights. It would seem no more open to another judicial system to prescribe the propriety of the federal attorney's conduct before the federal bench than to prescribe the same outside the federal court room with respect to a pending federal case.

The standard as set by the Territorial Court must of necessity affect the administration of justice in the federal courts on a day to day basis. For every member of the bar of the federal court who is also a member of the bar of the Territorial Court (and we suspect that there are few who do not belong to both) must comply, in his federal practice, with this territorial standard or be sub-

ject, as was petitioner, to discipline in the Territorial Court. Thus the licensing power of the Territorial Court is used both to create and impose the territorial standard upon attorneys in their practice before the federal courts. As a matter of specific practice, the imposition of discipline by the Territorial Court automatically leads to disciplinary proceedings, initiated by forthwith suspension from practice, in the District Court in accordance with its Rule 1(d). (App. p. 85.) And, indeed, proceedings are now pending against petitioner in that court to discipline her there on the basis of the judgment of the Territorial Court here under review. The attorney who belongs to the bar of both courts, then, would be under compulsion of discipline to observe in his federal practice a rule or standard of conduct concerning that practice laid down by the Territorial Court, and, if discipline were imposed by that court, it would lead to further disciplinary proceedings in the federal court. The territorially-fixed standard could thus be enforced against the federal attorney in both courts and all at the initiation of the Territorial Court.

It is to be emphasized that we do not deal here with misconduct which is well-defined and universally condemned as destructive of professional qualifications. This is not a case of suborning perjury or stealing a client's funds. In such matters the content of the offense is the same anywhere, and the only inquiry would be whether the offense had been committed. Any court whose license the lawyer holds would have competence to act.

Here petitioner was charged with conduct the very quality of which, for disciplinary purposes, stemmed from its relationship to the matter pending in the federal court and her participation therein. The question was not whether she had done an act all legal standards condemn.

Rather, it was whether, in the context of the case then pending, the things she said or did could fairly be held so to transgress the bounds of propriety as to merit discipline. It was the effect, if any, on the federal court, upon the trial of a case in that court, and its jury system, which would render petitioner's conduct censurable.[45] Unless power to make that determination is to be reserved to the federal court it is *pro tanto* deprived of power to manage its own affairs. Similarly, it was for the federal court to decide how to make the delicate adjustment, *in its court*, of the competing interests of a public confidence in the judiciary and full public discussion, as well as the concern for the inviolability of jury deliberations and the protection of the jury system from wrong-doing and frame-up. The federal court had both power and the right (indeed the duty) as to matters before it, to set the standard. For the setting of the standard is inseparable from the administratoin of justice in its forum.

It is in these lights the genesis of the charges against petitioner takes on a gravity weighted by considerations of proper relationships between the two judicial systems. Judge Wiig was deeply concerned over the initial reports of petitioner's speech. [R. 31-33.] She was a member of the bar in his court, and that court had power to punish her for contempt or discipline her for misconduct—*if, by the federal court's standards*, such was warranted. Judge Wiig ordered an investigation, and from the fact that the evidence adduced below came to the Bar Association's counsel from the F.B.I. [see R. 192.

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[45]It was precisely this about which Judge Wiig evinced immediate concern [R. 32], and his failure to act in his judicial capacity after full investigation the more significantly reflects a determination that petitioner's utterances did not deserve discipline or punishment.

195, 185-186, 173, 154], it is inescapable that the investigation was made. Judge Wiig took no action; the District Court took no action.[46] If there was any merit to the complaint against petitioner, Judge Wiig's suggestion that the Bar Association look into the matter set in motion a train of events that led to a usurpation of his court's power in a matter gravely affecting its administration of justice.

The preservation of the federal court's jurisdiction to manage its own affairs also serves an important policy consideration. To permit this essentially federal matter to arise upon complaint of a local bar association, be heard in a local proceeding and be determined by a local court creates too facile an opportunity for the impact of local currents. It is a commonplace that local forces, whether official or not, are less sensitive to broader policy considerations of national stature and that local agencies of publicity may evince less vigilance in calling them to account. Compare *Board of Education v. Barnett*, 319 U. S. 624, 637, 638. Whether this narrowing of horizon results from mere preoccupation with local interests or the pursuit of selfish advantage, it necessarly disqualifies the local tribunal from creating the standards whereby the important interests here are weighed and determined.

Petitioner's record shows long service on behalf of the labor organization representing the non-Haole working people of the Islands as well as many individuals from this stratum in a social structure which is so sharply divided as to merit the description "tense" in the area

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[46]From this it might well be argued that it was determined that petitioner's conduct transgressed no federal rules. This the more so because of Judge Wiig's praise of all counsel, including petitioner, at the end of the *Fujimoto* trial. [R. 510, 524.] But it is not necessary to reach that question.

of labor relations (*ILWU v. Ackerman, supra,* at p. 77) and generally as a "welter of divergent . . . characteristics and clashing economic interests." *United States v. Fujimoto* (D. C. Haw.), 105 Fed. Supp. 727, 729. Some of the litigation in which petitioner has been involved found her pitted against the complaining bar association in the *Ackerman* case (9 Cir., 187 F. 2d 860, cert. den. 342 U. S. 859) and against one who later became a justice of the Territorial Court which reached the judgment here under review (*Alesna v. Rice, supra*). In nearly all of her career she has radically challenged the *status quo*. As petitioner's affidavit supporting her suggestion of disqualification of Mr. Justice Rice of the Territorial Court indicates [R. 52-65], by long background, experience and family connections, if not by immediate personal interest, Mr. Justice Rice and petitioner stem from opposite poles in an extremely complex and profoundly defined social antagonism. The curious amendment of Rule 19, following the commission of the offenses charged against petitioner, so as to permit the bar association to file a complaint in the Territorial Court after no action had been taken in the federal court, cannot be viewed in isolation from this whole background.

This is not to say that the judgment of the Territorial Court is tainted by these influences. Nor need this Court so decide. In areas of exclusively federal concern, however, it is established policy to eliminate the opportunity as well as the appearance of local influence toward local ends, whether these reflect group ambitions or personal bitterness. Compare *Pennsylvania v. Nelson*, 350 U. S. 497, 507. Given the setting of the Territory as recognized by two Circuit judges, and petitioner's professional

record as exemplified by the case reports alone, one cannot say that the potential for local influence was lacking. It is to neutralize that potential that the policy here contended for would operate. The policy we submit is wise whether or not the evil exists in a specific case. For all these reasons we submit that sound considerations of policy warrant the voiding of the judgment of the Territorial Court. It is one thing for that court to fix its own rules of conduct for lawyers in cases before the Territorial Court. It is quite another for that court to prescribe standards of conduct for federal attorneys in cases pending in the federal courts. The "deference" normally shown by federal authority for the integrity of a local jurisdiction is, we submit, a two-way street. Compare *Waialua Agricultural Company v. Christian*, 305 U. S. 91, 108-109.

In re Isserman, 9 N. J. 269, 87 A. 2d 903, relied on by the majority below [R. 566], does not support the procedure followed in this case but rather supports petitioner's position. Isserman had been charged with contumacious conduct toward the federal court in the course of the trial of the *Dennis* case. He was adjudged guilty of contempt by federal standards and all questions relating thereto were finally resolved by this Court before the state court acted. *Sacher v. United States*, 343 U. S. 1. The state court's decision rests, not upon its own evaluation of Isserman's conduct in accordance with its standards, but rather upon its acceptance of the federal court's evaluation by its own standards. New Jersey did not undertake to decide that Isserman had committed an offense against the federal court. But it having been finally decided by the federal courts that he had committed that offense, New Jersey determined his fitness on that account to remain a member of its bar.

APPENDIX.

Pertinent Portions of Rule 19, Rules of the Supreme Court of the Territory of Hawaii, as Amended, October 31, 1953.

19. RULE GOVERNING PROCEEDINGS TO STRIKE ATTORNEY'S NAME FROM ROLL AND THE UNLAWFUL OR UNAUTHORIZED PRACTICE OF LAW.

1. Complaints against members of the bar for improper or unprofessional conduct shall be in writing and filed in triplicate by the attorney general, any of his deputies, or any person aggrieved by the conduct of any attorney licensed to practice in any territorial court, with the clerk of the supreme court of the Territory of Hawaii, who shall keep the same in a secret file available only to the justices of the supreme court, the person charged, and the committee to which the court may have referred the matter for investigation as hereinafter provided.

Such complaint need not be formal but shall be in writing and set forth with reasonable certainty the time, place and circumstances of the alleged misconduct, and if filed by anyone other than the attorney general or one of his deputies, it shall be verified under oath, and the court may require the same to be made more specific.

If the court deems that the complaint sets forth a *prima facie* case of misconduct warranting investigation, it may refer the same to a standing committee, to be known as Committee on Legal Ethics, consisting of three members of the bar, appointed by the court for investigation. The members of said committee shall hold office at the pleasure of the court. Such committee shall furnish the accused person with a certified copy of the complaint which shall be prepared by the clerk of the supreme court. Any at-

torney complained of may file an affidavit of bias and prejudice with the court concerning any member of the committee at any time prior to the commencement of the hearing by the committee. If the court shall find the same well-founded the court shall appoint another person to such committee to replace the member thus disqualified.

Such committee is hereby empowered and charged to investigate and take proof concerning such complaint. The hearings before the committee shall be private, unless the attorney charged shall request that they be public. The person charged shall be entitled to be present at every hearing of the committee and to be represented by counsel, to cross-examine witnesses, and to submit such evidence as he desires. Upon request of the committee, this court may assign a reporter of the circuit court to take and transcribe shorthand notes of the testimony, and a clerk of the circuit court to administer oaths, in the same manner as before a circuit judge.

Upon application by such committee, the clerk of this court shall issue writs of subpoena *ad testificandum,* writs of subpoena *duces tecum* or *dedimus potestatem* to take depositions. Any person failing to obey any such subpoena shall be in contempt of this court and subject to punishment accordingly.

At the end of the hearing, the committee shall make report to this court of its findings of fact and conclusions of law and file therewith the record of such hearing, all of which shall be kept by the clerk in a secret file available

only to the attorney charged and to the justices of
supreme court. The attorney charged shall, upon requ
be entitled to receive from the clerk of the supreme co
a certified copy of the committee's report and the rec
of the hearings had before the committee. If the comm
tee shall recommend disbarment or other discipline,
matter shall then be docketed, made a matter of pu
record, and entitled in the name of the attorney charg
and thereupon an order shall issue from this court to
attorney charged to show cause, if any he has, why
findings and conclusions of the committee should not
adopted, and such judgment as the court may deem pr
entered. When the rule shall be answered the court s
fix the time for hearing, and may designate the attor
general or one of his deputies or any member of the ba
this court to present the case on behalf of the complain
The matter shall be tried *de novo* by the court, and s
judgment shall be entered as the court shall deem pro

Pertinent Portions of Rule 19, Rules of the Supreme Court of the Territory of Hawaii, as Amended, April 21, 1954.

RULE 19. IMPROPER OR UNPROFESSIONAL CONDUCT AND UNAUTHORIZED OR UNLAWFUL PRACTICE OF LAW.

1. Complaints of improper or unprofessional conduct by any attorney licensed to practice in any court of the Territory of Hawaii (hereinafter referred to as the licensee) or of any unauthorized or unlawful practice of law by any individual, partnership, corporation or other entity (hereinafter referred to as the person charged) may be filed in this Court by the Attorney General, the Bar Association of Hawaii (hereinafter referred to as the Bar Association) or any person aggrieved.

The complainant shall, if other than the Attorney General or the Bar Association, verify the complaint under oath. An orginal and five (5) copies of the complaint shall be filed with the Clerk of this Court (hereinafter referred to as the Clerk), who shall keep the same in a secret file available only to the Court and to such other persons as herein provided.

The Court shall refer the complaint to its Committee on Legal Ethics and Unauthorized Practice (hereinafter referred to as the Committee), which shall consist of seven (7) members of the Bar of this Court, of whom five (5) constitute a quorum. Members shall be appointed by and hold office at the pleasure of the Court. The Court shall designate the Chairman. The Committee shall hold its hearings in the courtroom of the Court. All expenses incurred by the Committee in connection with

its hearings shall be borne by the Court. The Committee shall be empowered, subject to the approval of the Court, to formulate rules for the government of its procedure.

The Committee shall cause the licensee or the person charged to be served, in the manner provided by law, with a copy of the complaint, together with a notice of the time and place of hearing. Due return of the service of the complaint and notice shall be filed with Committee. If the complaint shall have been filed by other than the Bar Association, a copy of the complaint and notice shall be furnished the President of the Bar Association and the Bar Association shall thereafter be permitted to appear at any hearing before the Committee or proceeding before the Court as *amicus curiae*.

The licensee or person charged shall have the right within ten (10) days prior to the date set for the commencement of the hearing to file an affidavit of bias and prejudice concerning any member or members of the Committee. All challenges raised by such affidavit shall be passed upon by the Committee, whose determination with respect thereto shall be final. In the event challenges determined to be well founded shall reduce the number of available members of the Committee below that necessary for a quorum for the hearing of the matter complained of, the Court shall make additional appointments to the Committee.

The Committee is empowered and charged to conduct a hearing for the investigation of those matters raised by the complaint. The hearing shall be closed unless the licensee or person charged makes a written request prior to the commencement of the hearing that it be a public hearing. The licensee or person charged shall be entitled

to be present at the Committee hearing, to be represented by counsel thereat, to cross-examine witnesses, and submit evidence. Hearings shall be conducted in such manner as to permit the admission of relevant evidence. Upon request of the Chairman, the Court may assign a reporter to record and transcribe testimony and a clerk to administer oaths. Upon application of the Chairman, the Clerk shall cause to be issued, writs of subpoena *ad testificandum, duces tecum* or *dedimus potestatem*. Failure to obey any such subpoenas shall be deemed contempt of the Court.

On completion of the hearing the Committee shall file with the Court its findings of fact, conclusions of law and recommendations as to action to be taken by the Court in the matter, together with the entire record of its proceedings, including all papers, transcripts, minutes and exhibits, all of which shall be kept by the Clerk in the secret file. The licensee or person charged, and, upon request, the Bar Association and the Attorney General, shall be entitled to receive from the Clerk a certified copy of the findings of fact, conclusions of law and recommendations of the Committee.

If the Committee shall recommend disciplinary action be taken against the licensee or a judgment entered against the person charged, it shall submit an Order to Show Cause issuable from this Court, addressed to the licensee or person charged, directing within twenty (20) days of issuance that cause be shown, if such exists, why the findings, conclusions and recommendations of the Committee should not be adopted. Upon issuance of the Order the same shall be served upon the licensee or person charged, in the manner provided by law, and the case shall be docketed and made a matter of public record.

The Court may designate the Attorney General or one or more members of the Bar of this Court to present the case on behalf of the complainant. Upon an answer being filed to the Order to Show Cause, the Court shall fix a time for hearing and the matter shall be heard *de novo*. On failure of the licensee or person charged to answer as required in the Order, default shall be entered and proof, should the Court so order, may be made *ex parte*. Such judgment may be entered as the Court shall deem proper.

Nothing herein contained shall be construed to require this Court to follow the recommendations of the Committee and irrespective of such recommendations this Court may, in its discretion, proceed or refrain from proceeding in any cause falling within the purview of the Rule.

2. The presently existing jurisdiction and power of this Court and the other Courts of the Territory of Hawaii to grant appropriate relief in causes involving improper or unprofessional conduct by attorneys or unauthorized practice of law by other persons, shall not be deemed to be limited, restricted or abrogated by anything contained in Section 1 of this Rule.

3. This Rule shall become effective forthwith and shall govern all proceedings brought on or after this date, and all pending proceedings except to the extent that in the opinion of the Supreme Court the application of the Rule to a pending proceeding would not be feasible or would work injustice in which event the former procedure shall apply. April 21, 1954.

Rule 15 (d), Rules of the Supreme Court of the Territory of Hawaii (Effective October 3, 1955).

RULE 15. ADMISSION TO THE BAR.

. . . (d) Reinstatement of Disbarred or Suspended Attorneys. No attorney who has been disbarred or suspended shall be eligible for reinstatement except upon a clear showing that he has complied in good faith with the order of disbarment or suspension, and that he is entirely worthy of the court's trust and confidence. An attorney who has been disbarred, or suspended for a period of six months or more, upon certification by the court of his eligibility, shall be required to pass an examination as though applying for admission to the bar.

Pertinent Portions of Rule 1, Rules of Civil Procedure for the United States District Court for the District of Hawaii (as Amended and Effective March 21, 1955).

RULE 1. ATTORNEYS.

(a) Roll of Attorneys.

The bar of this court consists of those heretofore and those hereafter admitted to practice before this court, who have taken the oath prescribed by the rules in force when they were admitted or that prescribed by this rule, and have signed the roll of attorneys of this district.

(b) Eligibility.

Any person who is a member in good standing of the bar of (1) the highest court of this Territory or of (2) the highest court of a state is eligible for admission to the bar of this court.

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(d) Disbarment and Discipline.

Any member of the bar of this court may for good cause shown and after an opportunity has been given him to be heard, be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the court may deem proper.

Whenever it is made to appear to the court that any member of its bar has been disbarred or suspended from practice or convicted of a felony in any other court he shall be suspended forthwith from practice before this court and, unless upon notice mailed to him at his last known place of residence he shows good cause to the contrary within 20 days, there shall be entered an order of

disbarment, or of suspension for such time as the court shall fix.

Any person who before his admission to the bar of this court or during his disbarment or suspension, exercises in this district in any action or proceeding pending in this court any of the privileges of a member of the bar or who pretends to be entitled so to do, is guilty of contempt of court and subjects himself to appropriate punishment therefor.

(e) Disciplinary Proceedings.

(1) The court will appoint by an order entered in its minutes a "Standing Committee on Discipline," consisting of five members of the bar, and will designate one of the members to serve as chairman. The members shall continue in office for a period of two years or until further order of the court.

(2) It shall be the duty of the committee to investigate any charge or information, referred by one of the judges or otherwise coming to the attention of the committee, that any member of the bar may have been guilty of unprofessional conduct or of any conduct unbecoming a member of the bar of this court; and in cases where a majority of the members shall deem advisable, the committee shall institute and prosecute an appropriate disciplinary proceeding.

(3) Every proceeding hereunder shall be commenced by filing with the clerk an appropriate petition on behalf of the committee addressed to the judges of the court. Upon the filing of the petition, the proceeding shall be assigned to one of the judges in the same manner as any other civil action or proceeding pursuant to directions given to the clerk by the court.

(4) The judge to whom the proceeding is assigned shall forthwith issue an order to show cause, addressed to the respondent member of the bar, requiring him to appear and show cause within not less than ten nor more than twenty days from the date of the order, why he should not be disbarred, suspended, or otherwise disciplined as prayed for in the petition. The order shall further require that a copy thereof, together with a copy of the petition, be served on the respondent in a manner permitted by Rule 5 (b) of the Federal Rules of Civil Procedure, not less than ten days in advance of the date therein specified for showing cause.

(5) The judge to whom any proceeding hereunder is assigned may invite the other judge of the court to sit with him and participate in the proceeding.

(6) In all proceedings hereunder, written findings of fact and an order based thereon shall be filed.

(7) Except as otherwise provided in this rule, all proceedings hereunder shall be governed by the Federal Rules of Civil Procedure.

(8) Disciplinary proceedings under this rule shall not affect or be affected by any proceeding for contempt under Title 18 of the United States Code or under Rule 42 of the Federal Rules of Criminal Procedure.